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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
PETITIONER,

vs.

DANIEL T. JACKSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1956

CERTIORARI GRANTED NOVEMBER 5, 1956

INDEX TO JOINT APPENDIX

	Page
Amended Complaint	2
Answer	5
24 Congressional Record 1477	6
United States of America v. *St. Louis San Francisco Railway Company* (Unreported decision)	8
Order Denying Defendant's Motion to Strike	13
Memorandum to Clerk on Denial of Defendant's Motion to Strike	13
Verdict and Judgment	15
Memorandum of Trial Judge on Motion for Judgment n.o.v. or for New Trial	16
Order Overruling Motion for New Trial	16
Notice of Appeal	17
Designation of Record	17
Appellant's Statement of Points	19
Amendment to Appellant's Designation of Record	19
Plaintiff Appellant's Designation of Additional Portion of the Records to be Included	20
Excerpts from Testimony and Proceedings	
Witnesses:	
Kenneth Chrissinger	60
Daniel T. Jackson	20
Frederick H. Pflaging	58
Court's Charge to Jury	73
Exhibits	
Defendant's Exhibit 18 (Stipulation)	77
Excerpts from Defendant's Exhibit 19 (Deposition of Wilber J. Barnes)	79

	Page
Defendant's Exhibit 4 (Order of the Interstate Commerce Commission)	81
Excerpts from the Defendant's Exhibit 20 (Deposition of James O. Tolbert)	84
Defendant's Exhibit 6 (Letter from Interstate Commerce Commission)	92
Defendant's Exhibits 16, 16a, 17 (Plat of Washington Grove Station)	95

	Original	Print
Proceedings in U.S.C.A. for the District of Columbia Circuit	96	96
Opinion, Burger, J.	96	96
Judgment	106	104
Clerk's certificate (omitted in printing)	109	
Order allowing certiorari	110	105

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant,

v.

DANIEL T. JACKSON, *Appellee*

Appeal from the United States District Court for the District of Columbia

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JOINT APPENDIX

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS

282 Filed June 16, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*.

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant*

Amended Complaint Filed Pursuant to Pre-trial Order

Plaintiff, for his complaint, alleges:

FIRST CAUSE OF ACTION

FIRST: Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and is doing business within the jurisdiction of this Court as an interstate common carrier.

SECOND: Plaintiff is, and at the times hereinafter alleged was, a resident of the State of Maryland.

THIRD: This action arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as the Federal Employers' Liability Act (45 U.S.C.A. Sections 51-60) as hereinafter more fully appears.

FOURTH: On the dates, and at all times hereinafter mentioned, plaintiff and defendant were engaged in interstate commerce, within the purport of said Act.

FIFTH: On November 1, 1951, plaintiff was injured on defendant's tracks in the vicinity of Washington Grove Station, Maryland.

SIXTH: On said date, plaintiff, in the course of his duties as a section foreman, was required to operate a

motor car to which a truck was attached, and while so engaged was caused to sustain injury.

283 . SEVENTH: The injuries of the plaintiff were directly and proximately caused in whole or in part by the carelessness and negligence of the defendant, its servants and agents.

EIGHTH: Defendant was negligent because the motor car which plaintiff operated was required to pull a heavy load over wet and slippery rails when said truck was not equipped with any brakes or other means of stopping.

NINTH: Defendant was negligent because it had directed plaintiff to operate a car and truck without sufficient braking power.

TENTH: By reason of defendant's negligence thereof, plaintiff sustained a fracture of the third lumbar vertebral body, traumatic degeneration of the intervertebral disc between the third and fourth lumbar vertebrae and severe injuries to the head, neck, back, chest, arms and legs, and severe nervous shock, all of which has caused him great mental and physical pain and he will so suffer for the remainder of his life; that plaintiff was given hospital and medical care and treatment following the accident, and that he will require, receive and incur expenses for additional medical care and treatment in the future.

ELEVENTH: At the time of the aforesaid accident, plaintiff was earning and capable of earning substantial wages as a section foreman, but by reason of the occurrence hereinbefore set forth, he has lost wages and earnings which he otherwise would have acquired and has become totally incapacitated from resuming his former railroad occupation and from engaging in any other form of labor.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of $100,000.00 and costs on this Cause of Action.

Second Cause of Action

Twelfth: Plaintiff incorporates by reference thereto all of the averments of paragraphs First to Sixth inclusive and Eighth to Eleventh inclusive of the First Cause of Action.

284 Thirteenth: The injuries of the plaintiff were directly and proximately caused in whole or in part by the defendant's violation of the Safety Appliance Act, 45 U.S.C. Sections 1, 8, 11 and 23 and I.C.C. Regulations 204 and 235 because the motor car was not equipped with sanding apparatus and other appurtenances set forth below.

Fourteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act because the motor car was not equipped with a power driving wheel brake.

Fifteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act because the truck was not equipped with any brakes.

Sixteenth: Defendant violated Sections 1, 8, 11 and 23 of the Safety Appliance Act and I.C.C. Regulations 204 and 235 in that it had directed plaintiff to operate a car and truck without sufficient braking power.

Wherefore, plaintiff prays judgment against the defendant in the sum of One Hundred Thousand Dollars and costs on this Cause of Action.

Harry P. Warner
Harry P. Warner,
916 Evans Building,
Washington, D. C.
Attorney for plaintiff

285 Filed Dec. 8, 1952

Answer

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

The defendant answers the numbered paragraphs of the complaint as follows:

1. Defendant admits that it is a railroad corporation organized under the laws of the State of Maryland and doing business within the District of Columbia as an interstate common carrier.

2. Defendant admits that plaintiff is, and at the times alleged in the complaint was, a resident of the State of Maryland.

3. The defendant admits that this action is brought under the Federal Employers' Liability Act.

4. Defendant admits that at the time the accident complained of took place, plaintiff and defendant was engaged in interstate commerce within the purport of the Federal Employers' Liability Act.

286 5. Defendant admits that the accident complained of took place November 1, 1951 on defendant's tracks in the vicinity of Washington Grove Station, Maryland.

6. Defendant admits that on November 1, 1951 plaintiff, in the course of his duties as a section foreman, operated a motor car and the accident complained of took place while plaintiff was so engaged.

7. Defendant denies that the injuries alleged by plaintiff were caused by the carelessness and negligence of the defendant, its servants or agents. Defendant denies that

it violated the Safety Appliance Act, or that the alleged injuries to the plaintiff were caused by any violations by defendant of the Safety Appliance Act.

8. Defendant denies that plaintiff was seriously or permanently injured as a result of the aforesaid accident. The defendant denies each and every allegation contained in Paragraph 8 of the complaint.

9. Defendant denies that plaintiff became totally incapacitated from resuming his occupation or from engaging in any other form of labor. Defendant denies each and every allegation contained in Paragraph 9 of the complaint.

10. Defendant denies each and every allegation of the complaint not specifically admitted herein.

THIRD DEFENSE

Any injuries sustained by plaintiff as set forth in the complaint were caused by an unavoidable accident
287 or were caused in whole or in part or were contributed to by plaintiff's negligence.

STEPTOE & JOHNSON

* * * * * * * * * *

296 24 Cong. Rec. 1477

The four-wheel exemption was offered as an amendment to H.R. 9350 on February 11, 1893 by Senator Blodgett:

Mr. Blodgett: I desire to offer an amendment. At the end of Sec. 6 of the bill as reprinted. I move to add the following proviso: Provided, that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains . . . Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used,

because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that particular work. A hook arrangement and link are used with considerable lost motion between the cars.

It is necessary to use that appliance, as I said, in order to go around the sharp curves. I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic,
297 and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.

Mr. Cullom: I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

Mr. Stockbridge: Let the amendment be read. (The Secretary read Mr. Blodgett's amendment to the amendment of the Committee.)

Mr. Stockbridge: That is all right.

(The amendment to the amendment was agreed to)

. . . . . .

298 DISTRICT COURT OF THE UNITED STATES

in and for the

EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

No. 5522.

UNITED STATES OF AMERICA, *Plaintiff*

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, *Defendant.*

FARIS, J.

At a session of Court held in St. Louis, Missouri, on May 11, 1922, the Court orally announced the following opinion:

This is a case in which a jury was waived, and which was submitted to the Court a few days ago on an agreed statement of facts. I have now reached a conclusion.

I regard is as unnecessary to detail the facts which are stipulated, because in so far as those facts are pertinent in connection with the law I shall state them in what I have to say about the case.

The case turns practically upon a question of
299 law and upon what was in the mind of Congress when it amended a certain statute. Suffice it to say, that the facts agreed upon between the United States District Attorney, representing the plaintiff, and counsel for defendant, clearly suffice to render the defendant guilty of violating Section 6 of the Act of March 2, 1893 (27 Stats., 531) as amended by The Act of April 1, 1896 (29 Stats., 85), provided, of course, as I said in the beginning, the Court shall find as a matter of law that the facts bring the defendant within the purview of the statute as it stood when the acts complained of were committed.

It clearly appears from the agreed statement of facts, that some two miles or more (it does not make any particular difference about the number of miles) of the main line interstate track of defendant are used daily, or almost daily, by the Cape Girardeau Portland Cement Company on which to operate small four-wheel cars used in hauling clay to the Cement Company's factory from the mine whereat that clay is mined. These cars, as well as the locomotive which hauls them, as also the employees, including the engineer in charge of this train, are employees of the Cement Company and not of the defendant in the case. That, of course, is said merely casually, because it does not make any difference in the case.

The statute forbids the use of cars that have certain defects, which these cars have, upon an interstate railroad track, and makes the railroad company liable. If the railroad company permits somebody else to use these interstate tracks in derogation of the law the railroad company, of course, and not the person or company which so uses
300 them, is liable. So, if the law now in force applies to four-wheel cars used in hauling clay, defendant is clearly liable and judgment ought to be rendered against it for the penalty fixed by statute. It is clear that there is nothing involved in the case, as I stated before, except an investigation of the facts under the Act as first passed, that is, when passed in 1893. There was then a proviso which exempted defendant from penalties for defects occurring in the operation of trains composed of four-wheel cars. This proviso read thus:

"Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars, or to locomotives used in hauling such trains."

As originally passed that is what the proviso contained, and that is all that it contained. It is clear, then, that before the Act of 1893 was amended, defendant would not have been liable here, and judgment out of hand must have been for defendant, but by the Act of April 1, 1896, the

prior law was amended so that the proviso contained in the original Act of March 2, 1893, read, at the time the acts complained of in this case were committed, as follows:

"Provided, that nothing in this Act contained shall apply to trains composed of four-wheel cars, or to trains composed of eight-wheel standard logging cars, when the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

It is contended by the Government, therefore, that the character of the freight hauled now is determinative of the question, that is, that a four-wheel car may be used, or a standard eight-wheel logging car may be used in hauling logs, even though the equipment may violate the law otherwise, but that if a four-wheel car be used for
301 any other purpose than a logging car the Act is violated.

In order to lend color to this view the attention of the Court has been called to the report of a Committee of Congress (I do not know to what branch of Congress that Committee belonged, and it does not make any difference), which Committee had in hand the matter of reporting upon the amendment proposed, and finally passed in 1896, as throwing some light upon what was in the congressional mind when the amendment was added.

This report indicates that the Committee had the notion that the original proviso exempting all four-wheel cars was put in for the sole purpose of relieving logging cars from the burden of the Act. It is urged that the Committee had only then just discovered that eight-wheel standard flat cars are used for hauling logs, and not four-wheel cars at all; so, that the original Act interfered with logging operations. The Committee assumed, incorrectly, it is apparent, that the original proviso was enacted for the sole behoof and benefit of those engaged in logging. If this be

a fact the proviso itself, as originally enacted fails to disclose it, for this proviso exempted all trains composed of four-wheel cars and the locomotives hauling them, regardless of whether such cars haul clay, brick, rock or logs, or any other commodity for which four-wheeled cars may be used.

It seems to be obvious that Congress believed it had happily provided for the exemption of logging cars, when it exempted all four-wheel cars by the original Act of 1893. Later it became advised that it had erred as to a matter of fact, not of law, in that eight-wheel standard flat cars were found to be used in the logging business,
302 and not four-wheel flat cars at all, or at least but rarely. Hence, the amendment which caused this action.

It is wholly obvious to me, that neither what the Congress enacted in and by the amendment of April 1, 1896, nor what the Committee said about its intention in its report, is inconsistent with the view that Congress by this amendment intended to add to the exemptions, rather than to restrict or narrow them further. In the original amendment four-wheel cars were all exempt, I repeat, from the provisions of the Act, but no eight-wheel standard flat cars were exempt. It would have been very easy, I think, if Congress had intended, therefore, to narrow and restrict, rather than to broaden this proviso, for it to have said so, when you consider the fact that originally all four-wheel cars were exempt, that is, all trains on which four-wheel cars only were used were exempt, and when you consider that Congress deemed it had fully covered the situation then, but finding that it had been guilty of an error of fact, deemed it necessary to amend by specifically allowing eight-wheel standard flat cars to be used; that it intended not to forbid the use of four-wheel cars by that amendment, and that it did not intend to exempt four-wheel flat cars only when those were used for logging purposes, because the fact appears that Congress finally discovered that no

such cars were used. Then if it had only in mind the idea of exempting logging operations, and none other, from the operations and provisions of this Act it would have been easy to have said so. Of course, the Court is not permitted to construe this Act on the theory of what is best. I can only construe it from the rule as it appears in the Act itself. If I were permitted to go into the realm of
303 hypothesis and guess about it I should conclude, naturally, that a four-wheel car loaded with logs would be a greater menace to interstate traffic, both freight and passenger traffic, and to the employees engaged therein, than would the same sort of car loaded with material like clay. The logs themselves upon it would be a menace, in addition to the car which hauls those logs.

I also might consider (if I were to go into the realm of fact, and were allowed to consider the facts, or to consider the hurt and harmfulness of the thing done, rather than the terms of the statute itself), that an eight-wheel standard flat car loaded with logs was about five times as menacing to interstate traffic, to the employees, to the passengers and to the freight carried therein, as is a four-wheel car loaded with clay. I think it is clear, when you interpret what Congress actually did, in the light of the situation existing before it did it, and after it did it, that it could not have intended to eliminate from the exemptions four-wheel cars, or to require those four-wheel cars to be used for logging purposes, because it is conceded by the Government here that a four-wheel car used for logging purposes is exempt from the provisions of the Act, but that a four-wheel car used for hauling clay is not exempt by the provisions of the Act. I repeat, that in the light of the fact that Congress discovered for the first time in 1896, that four-wheel cars were not used for logging purposes, but that eight-wheel standard flat cars were used for logging purposes, that that fact alone clears up the situation entirely and makes it incumbent upon the Court to find for the defendant in this case, which the Court accordingly does.

304 If you want me now, in addition to these remarks, Mr. Carroll, to pass on any declarations of law in order that you might test the accuracy of the Court's views, I shall be glad to do so.

Mr. Carroll: I would like to have that permission.

The Court: Very well.

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305 Filed Mar. 10, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant*

Order

Upon consideration of defendant's motion to strike so much of plaintiff's complaint which alleges violations of the Safety Appliance Act, 27 STAT. 531 (1893) as amended, and upon consideration of briefs and memoranda of law submitted by plaintiff and defendant, it is hereby

ORDERED, ADJUDGED AND DECREED this 10th day of March, 1955, that defendant's Motion to Strike is hereby denied.

MATTHEW F. McGUIRE
Judge

306 Filed May 10, 1955

Memorandum to the Clerk

The Court adheres to its original position. It is not at all insensible to the practical argument advanced for the

non-inclusion of the type of vehicle involved here under the Safety Appliance Act.[1]

The fact is, however, that there is authority of respectable character which supports the position already taken.[2] The Court in the Hoffman case took the view that the statute was unambiguous. This is sound and accordingly resort cannot be had to extrinsic aids to construction. Nor does the fact, if it is a fact and it appears to be such, that the Interstate Commerce Commission has never since the passage of this statute some sixty years ago taken any steps to regulate vehicles of the character here involved inhibit this view, because the rule is that where there is no ambiguity, executive construction cannot change the plain language of a statute. (District of Columbia v. Pearson, (1921), 50 App. D.C. 303, 271 Fed. 377; Kansas City Southern R. Co. v. U.S. (1919), 252 U.S. 147. Federal Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349, 352 is dictum and not helpful.)

MATTHEW F. McGUIRE
Matthew F. McGuire
United States District Judge

5/10/55

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[1] 27 Stat. 531-2 (1892) as amended, 29 Stat. 85 (1896).

[2] Hoffman v. New York, N.H. & H.R. Co. 74 F. 2d 227, 232 (2d Cir. 1934); Spokane & Inland Empire Railroad Company v. United States, 241 U.S. 344, 350.

307 Filed June 23, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant.*

Verdict and Judgment

This cause having come on for hearing on the 16th day of June, 1955, before the Court and a jury of good and lawful persons of this district, to wit:

Clayton P. Balzer	William C. Smith
Milton Goldstein	Mrs. Emma H. Taylor
Clifford M. Hedrick	Hermon Polivoda
Roderick T. Bell	John A. Baronowski
Jesse L. Huestis	John A. Dunkel
John M. Kamrad	Mrs. San Juan W. Barnes

who, after having been duly sworn to well and truly try the issues between Daniel T. Jackson, plaintiff and The Baltimore and Ohio Railroad Company, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 23rd day of June, 1955, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of fifteen thousand dollars ($15,000.00)

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of fifteen thousand dollars ($15,000.00) together with costs.

HARRY M. HULL, *Clerk,*
By ANNE W. LYDDANE
Deputy Clerk.

By direction of
Judge JENNINGS BAILEY

(n)

308 Filed Oct. 6, 1955

The crux of this case is whether the Safety Appliance Act applies to the vehicle which the plaintiff was operating when injured. This vehicle was used in towing a truck and to that extent it was acting as a locomotive and was not used exclusively for the transportation of logs. Judge McGuire, in a memorandum opinion, overruled a motion to strike so much of the complaint as alleges a violation of the Safety Appliance Act. Apart from any question of being bound by that ruling I agree with it.

As in my opinion also the Act applies and as I find no merit in the other grounds set out in the defendant's motion, its motion for judgment non obstante veredicto or in the alternative for a new trial will be overruled.

JENNINGS BAILEY
Judge

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309 Filed Oct. 6, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Defendant.*

Order Overruling Motion for New Trial

Upon the coming on for hearing of the motion filed herein by defendant for judgment N.O.V. or in alternative, for a new trial, it is this 6th day of October, 1955, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, *Clerk,*

By ANNE W. LYDDANE
Deputy Clerk.

By direction of
Judge JENNINGS BAILEY

310 Filed Nov. 2, 1955

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant.*

Notice of Appeal

Notice is hereby given this 2nd day of November, 1955, that defendant Baltimore and Ohio Railroad Company hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23d day of June, 1955 in favor of plaintiff Daniel T. Jackson against said defendant Baltimore and Ohio Railroad Company.

STEPTOE & JOHNSON

By LAIDLER B. MACKALL

Attorneys for Defendant Baltimore and Ohio Railroad Company

311 Filed Nov. 12, 1955

Designation of Record

The Clerk of the United States District Court for the District of Columbia will please prepare a record on appeal for the United States Court of Appeals for the District of Columbia Circuit in the above entitled cause, and the following papers and proceedings are hereby indicated for inclusion in said record on appeal:

1. Amended complaint filed pursuant to pre-trial order.

2. Answer.

3. 24 Congressional Record 1477, quoted in Appendix A to defendant's reply memorandum in support of defendant's motion to strike.

4. Text of unreported decision in United States v. St. Louis-San Francisco R. Co., D.C., E.D. Mo. 1922, quoted in Appendix B to defendant's reply memorandum in support of defendant's motion to strike.

5. Order entering judgment for plaintiff in the amount of $15,000.00, entered June 23, 1955.

312 6. Opinion of Court and Order overruling motion of defendant for judgment n.o.v. or in the alternative, for a new trial, entered October 6, 1955.

7. (a) Partial transcript of testimony of June 15, 1955;

(b) Transcript of testimony of June 20, 1955, Volume I;

(c) Transcript of testimony of June 21, 1955, Volume II;

(d) Transcript of Court's charge to jury.

8. Defendant's exhibits:

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20.

9. Notice of appeal, filed November 2, 1955.

10. This designation.

* * * * * * * * * * *

314 Filed Nov. 15, 1955

Appellant's Statement of Points

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in holding that the Safety Appliance Act applied to the motor track car and push truck involved in this case.

2. The Court erred in submitting to the jury the question whether the absence of the equipment allegedly required by the Safety Appliance Act was a proximate cause of the accident in which plaintiff was injured.

3. The Court erred in submitting to the jury the question whether defendant's alleged negligence in furnishing the equipment plaintiff was using at the time of the accident was a proximate cause of the accident in which plaintiff was injured.

4. The Court erred in denying defendant's requested instructions numbers 1, 2, 3, 4, 5, 6 and 7.

STEPTOE & JOHNSON

* * * * * * * * * * *

316 Filed Nov. 15, 1955

Amendment to Appellant's Designation of Record

In addition to the papers and proceedings indicated for inclusion in the record on appeal heretofore requested in plaintiff-appellant's designation of record filed herein on November 12, 1955, the following additional papers are hereby indicated for inclusion in said record on appeal:

11. Statement of Points on Which Appellant Intends to Rely.

12. Stipulation entered into by the parties to this action through their respective counsel of record concerning the testimony of Leo Meltzer, United States Department of Justice.

13. This amendment to designation of record.

STEPTOE & JOHNSON

• • • • • • • • • • •

317 Filed Nov. 17, 1955

Plaintiff-Appellee's Designation of Additional Portion of the Records to be Included

The Clerk of the United States District Court, for the District of Columbia, will please include ~~in the~~ record on appeal in this matter in addition to those designated by the defendant-appellant:

1) Opinion and Order of Honorable Matthew F. McGuire sur. defendant's motion to strike.

2) Memorandum to the Clerk by Honorable Matthew F. McGuire sur. defendant's re-argument of defendant's Motion to Strike.

3) This Designation.

The Clerk will further note the objection of the plaintiff-appellee to the inclusion in the record of testimony relating to the injuries suffered in this case by reason of the fact that no issue upon which such testimony is relevant is raised by defendant's Statement of Points.

MILFORD J. MEYER

• • • • • • • • • • •

EXCERPTS FROM TESTIMONY AND PROCEEDINGS

217 **Daniel T. Jackson**

was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Meyer:

Q. What is your full name, Mr. Jackson?

. . . . . .

A. Daniel Thomas Jackson.

Q. Where do you live? A. Boyd, B-o-y-d.

Q. Boyd. And in what county is that?

. . . . . .

A. Oh, Montgomery County.

. . . . . .

218 Q. How old are you? A. I was 69 last birthday.

Q. Back in November of '51, on November 1, specifically, how old were you? A. Sixty-six.

Q. Mr. Jackson, when did you go to work for the Baltimore and Ohio Railroad Company? A. On the 12th day of April, 1905.

Q. 1905? A. Yes, sir.

Q. So that you were working with them for some forty-six and a half years before this accident happened? A. Yes, sir.

Q. What sort of work did you do during all those years? A. Well, I worked pretty—track work; I worked as a trackhand for the first seven years. I was promoted to foreman in 1912, August 1, 1912.

Q. And you were a foreman from 1912 until 1951? A. Yes, sir; I was until I was retired.

Q. You were still doing work as a track foreman? A. That is right.

. . . . . .

219 Q. Now, on November 1, 1951, what work were you assigned to do? A. I was assigned to take a truck-
220 load of coal down to the agent at Washington Grove.

Q. To the agent at Washington Grove Station is that? A. Washington Grove Station.

Q. Where was your base? Where did you start from? A. Gaithersburg.

Q. How far is that from Washington Grove Station? A. About a mile.

Q. What equipment did the Railroad supply you with for the purpose of doing your work? A. A motor car and a truck.

Q. Did the truck have any power of its own? A. No, sir.

Q. How was the truck propelled? How did it move along the rails? A. Pull it with the motor car.

. . . . . .

Q. Suppose you describe the motor car? A. Well,
221 it was a four-wheeled car that run on the track, with a clutch; two levers up there; one brake; pull one back for the clutch; with kind of a sliding motor in it. Motor—crank it from the center; brought back towards the hind end; hind end was the light end of it. Pulled this lever back; had a belt pull it. Pull the lever back; that tightens the belt and pull it.

Q. How would the belt operate on the brakes? A. The belt on the brakes? They didn't have anything to do with that.

Q. Well, how would the brakes operate? A. Well, by this here—you had a lever sitting right up on top of the motor car; grab that and pull it back. Had brakeshoe, one fit against each wheel; kind of gap like that (indicating); push it against the wheel that way.

Q. What sort of wheels were there? A. Iron wheels.

Q. Were they flanged to run on railroad tracks? A. Had flange on them to hold them on the track, yes, sir.

Q. What sort of brakeshoes were they? A. Steel.

Q. Did they move directly against the steel wheel? A. Yes, sir.

222 Q. Was there any brake lining of any sort? A. No, sir.

Q. Now, how about the truck that you were assigned? Did that have any brakes at all? A. No, sir.

Q. What sort of a truck was that? A. We call them push trucks. Don't have any motor car to them; push them by hand.

Q. How many wheels did that have? A. Four.

Q. What sort of wheels? A. Steel wheels or iron.

Q. With flanges? A. Flanges, yes, sir.

Q. Now, could either the truck or the motor car be operated anywhere except on the rails of the railroad? A. No way you could use them no place only on the rails. You could push them on the ground for a short distance. Sometimes unload them, had to pull them off; pull them beside the track. You could push them on the ground, but had no power to pull it.

Q. Now, did the motor car have on it any brakes or braking apparatus that could brake the wheels of the truck behind it? A. No, sir.

223 Q. Did the motor car have on it any sanding apparatus that could be poured on the rails to help stop? A. No, sir.

Q. Did the motor car have any air brakes at all? A. No, sir.

Q. Did the truck have any hand brakes? A. No, sir.

Q. Now you said that you went down to Washington Grove Station with a load of coal. A. Yes, sir.

Q. And where was the coal carried? A. Put it in the railroad room up at the Station.

Q. How did you get it down there, on the car or on the truck? A. We put the coal on the truck and pulled it down with the motor car.

Q. That is on the rails of the railroad? A. Yes, sir.

Q. Then what did you do after that, during that day? A. Well, I went on down road crossing at Washington Grove and pulled the motor car and the truck off. Washington Grove road crossing—I went there to work between Washington Grove and the road crossing the balance of the day on the track.

* * * * * * * * * * *

225 Q. How long is each length of rail? A. Thirty-nine feet.

Q. That will give us a good idea. That had to be lifted with jacks in order to fix it; is that right? A. That is right.

Q. Now, did you, as a track foreman, do any of the heavy work yourself? A. Well, lots of times when the gang was light, wouldn't have men enough; sure, I had to get in there and help to lift those rails. Sometimes they have a broken rail to change, ties to put in, switch ties, cross ties. Switch ties run from 9 feet long to 22 feet. They are 7x9 inches thick; nine-inch face; 7 inches thick. Some weight there.

Q. And you had to do that work yourself when you had a light gang? A. I had to help, sure.

Q. How many men did you have in your gang
226 this day? A. Two.

* * * * * * * * * *

Q. How long did you stay at the place where you were working that day? A. How long did we stay there?

Q. Yes. A. Well, until we got the coal on—we stayed there the balance of the day after unload the coal, until about four o'clock, I got them lined up to go in.

Q. What does that mean? A. Well, you have a motor car form to fill up. You have to take it up to the train dispatcher; fill out a form just the same as run the train. Operator gives you the dope; you write down on that form what he tells you. You ask for so many minutes of track. He gives you that many minutes.

Q. In other words, you have to get permission to
227 use the tracks, so you don't interfere with the movement of trains? A. That is right. You give him whatever points you want between Washington Grove and Gaithersburg. He gives you that track for that many minutes.

Q. You got a clearance for your track. Then what did you do? A. We loaded up and started for Gaithersburg.

Q. What did you load up with? A. With tools, track

tools, crowbars, line bars, jacks, rammers, hammers, track dredges, flanging equipment; always carry that with you at all times.

Q. Where did you put all that equipment? A. Some of it on the truck; some of it on the motor car.

Q. And after you moved your motor car and your truck back onto the westbound rails, were they coupled together so that the motor car could pull the truck? A. Yes, sir.

Q. Now, at that time, Mr. Jackson, how much would you say that the truck, as it was loaded then, weighed?

Mr. Mackall: Your Honor, I object. I thinl he ought to specify what tools he had, rather than just—

The Court: I think he can do both. Proceed, Mr. Meyer.

Mr. Meyer: I think he has given practically everything.

228 By Mr. Meyer:

Q. You didn't mention one thing. Did you have a wheelbarrow on there, too? A. Yes, sir.

. . . . . .

Q. About what would you estimate was the weight of that truck as it was equipped then when you started back? A. With the tools and the truck?

Q. Tools and the truck. A. I estimate about 1200 pounds.

Q. Were there any men on the car? A. On the truck or the motor car?

Q. On the motor car. A. I had two men and myself.

Q. Were there any men on the truck? A. No, sir.

Q. Now, what was the first thing that you had to do in order to start back to Gaithersburg? A. Well, we put the motor car and the truck on the Washington Grove road crossing, pushed it on down to where the tools was,

229 working there, about half the distance between Washington Grove Station and road crossing, and loaded up the tools. This here motor car, you had to crank it from the center; you had to take a stripping to crank it; crank handle went in the side of it. Never used to crank it because it kicked back. Pushed it off so it was in gear;

stop the car and let the men get on and be seated, and proceed on.

Q. Did you do that that day, push the car until it started? A. Yes, sir.

Q. And then you stopped it for the men to get on? A. That is right.

Q. Now, at that time, was the motor car and the truck —were they both on the westbound rails of the railroad? A. Yes, sir.

Q. And just about where were they with reference to Washington Grove Station at that time? A. Well, I was just a few rails there east of the platform, east of Washington Grove.

Q. When you say a few rails east, are you still referring to the 39-foot rails that you mentioned before? A. Yes, sir.

Q. Now, what sort of an afternoon was that, Mr.
230 Jackson? A. Well, it was one of these kind of a heavy mist, practically all day. Wasn't raining hard enough to make you go in out of it, but just nasty day.

Q. Was it enough to moisten or wet the rails of the railroad? A. Yes, sir, the rails was wet.

Q. Now, after you made your stop, did the two men get on the motor car with you? A. Yes, sir.

Q. Then what did you do? A. Proceeded on, started for Gaithersburg.

Q. How far did your motor car move from the time you started then until something happened? A. About 195 feet.

Q. 195 feet? A. Yes, sir.

Q. All right. Now, as you started from this position where the men got on, what did you notice, if anything, around the Washington Grove Station? A. Well, I noticed a good-sized dog standing right along Washington Grove office window.

Q. Do you remember what kind of a dog it was? A. Well, I am not very familiar with dogs. It was a big long-haired dog. I would say—they both look very
231 much alike to me—collie or shepherd, one or the other, looked something like to me.

Q. Had you seen that dog around the Washington Grove Station at any time before this day? A. The first time I ever seen the dog around the Station. There used to be a school bus come out there in front of the station across the street; used to see him down there with the children. First time I ever seen the dog on that side of the railroad.

Q. On which side of you was the station, to your left or to your right? A. The station was to my left, on the left side.

Q. Between where you were on the westbound rails and the station, were there any other rails? A. On the eastbound side.

Q. Just the two rails of the eastbound track? A. That is right.

Q. All right. Now, as you started, you say you saw this dog standing at the station? A. Yes, sir.

Q. Then what happened? A. Well, just as I—the motor car was about to pass the dog, I had taken my eyes off the dog to look in the direction I was going, the fellow, Dorsey, on there with me, sitting on the same side
232 I was, I heard him holler, "Go back, go back." As I looked around, the dog was coming across the eastbound track; I reached, grabbed the brake back with everything I had. The dog jumped in the westbound track in front of the motor car and when the dog jumped in the westbound track in front of the motor car, there she went, derailed.

Q. Where were you sitting on the motor car and operating it? A. Next to the hind end, on the left side of the motor car.

Q. Left side of the motor near the hind end? A. Yes, sir.

Q. Was the brake right there with you, the hand brake, that it had? A. Yes, sir.

Q. Now you said that this fellow, Dausey—was his name? A. Dorsey.

Q. —who was on the car with you? A. Yes, sir.

Q. You heard him yell, "Go back"? A. That is right.

Q. You looked around and you saw the dog on the
233 eastbound track? A. That is right.

Q. And the dog ran across over to the westbound track? A. That is right.

Q. When was it that you pulled on the handbrake on the motor car? A. Well, as soon as I saw the dog coming across, that is when I pulled on the brake lever.

Q. How far did the motor car and the truck go from the time that you pulled on the handbrake until you struck the dog and derailed? A. Well, I figured it about a rail length.

Q. And that is as you have indicated?

The Court: I didn't understand you.

The Witness: About a rail length. One rail length.

By Mr. Meyer:

Q. You have indicated that is 39-feet; is that right? A. Yes, sir.

Q. Now, suppose you tell us how far it is from one rail to the other on the opposite track? How far are the rails apart? A. Well, at that point there, most of them, they got 14-foot track center. Fourteen feet from center of one track to the center of the next. That makes your
234 center ditch there something like that (indicating).

Q. I wasn't talking about the center ditch between the two sets of rails. How far are the rails apart? Take the eastbound track, how far— A. Gauge apart from one rail to the other? Four-foot eight and a half inches.

Q. Exactly? A. That is the gauge, yes, sir; that is standard.

Q. Now, at that point we are talking about, at Washington Grove Station, approximately how far was it from the inside rail of the eastbound track to the inside rail of the westbound track? A. Well, I couldn't tell you exactly on that, sir, just how far that was.

Mr. Meyer: Do you have that exact dimension on your plan?

Mr. Mackall: Yes.

Mr. Meyer: Mr. Mackall has the exact dimension.

By Mr. Meyer:

Q. Now, how far across did the dog get before the motor car struck it and derailed? A. The dog got right in between the two rails of the westbound track. Now, I didn't feel the car bump up on the dog. From what I could see—

I was in the ditch; couldn't get up, my back—was
235 no part of the dog on top of the rail. The dog was laying between the two rails on the westbound track.

Q. For how long, Mr. Jackson, before the date of this accident, had you been operating these motor cars for the Baltimore and Ohio Railroad? A. Well, about thirty-four years. I stafted to operating motor cars in 1917.

Q. Had you had occasion to apply the brakes on motor cars of this type and this particular motor car on occasions before this accident? A. I never had no occasion to make a quick stop like that with a truck.

Q. Not with a truck. A. No, sir.

Q. Had you had occasions to apply the brakes on the motor car without the truck? A. Yes, sir, I have.

The Court: You mean a quick stop?

By Mr. Meyer:

Q. A quick stop? A. Quick stop.

Q. There is one more condition that you haven't testified about yet. At the point of the Washington Grove
236 Station where this accident happened, that you have just described, is the westbound track straight? A. No, sir, it is curved.

Q. Curved. Which way does it curve? A. Well, if you are going west, it curves to your left.

Q. And in the lefthand curve is there any banking of the track? A. Well, at the point of the accident, it is on a stilt.

Q. What does that mean? A. Well, what they call a pile sitting on top, slopes down like that; run into a cut where you have a bank on each side of it.

Q. Is there any difference between the level of the right-hand rail and the lefthand rail on the westbound track at the station there where the accident happened? A. Yes, sir.

Q. What is the difference? A. There is a compound curve there. Part of it carries around 4½ inches, 5 at that point. I am not sure, it was either 4½ or 5 inches.

Q. Does that mean that the righthand rail would be higher than the lefthand rail? A. Yes, sir.

237 Q. So that the inside of the curve would be on the low side? A. That is right.

Q. And which way did your car go off the track? A. It went off to the left on the low side.

Q. On the low side? A. On the low side of the curve.

Q. And then you landed between the two sets of track? A. That is right. At that point, the center ditch was empty with ballast, below the ties. Hopped over like that (indicating) when I went off.

Q. Under the conditions that existed at that time and place, Mr. Jackson,—

Mr. Mackall: I object. Let us specify those conditions.

Mr. Meyer: I am going to if you give me a moment.

Mr. Mackall: Excuse me.

By Mr. Meyer:

Q. —traveling at the speed that you were going, with the rails moist or wet, as you have indicated, at the point where the accident happened on the lefthand curve, with the left rail being lower than the right, as it was, within what distance could you have stopped the motor car alone, if it didn't have any truck, if you applied the emergency brake or the handbrake, the only brake it had, in the man-

238 ner that you have just described you applied it on this occasion?

Mr. Mackall: Just a minute. I object to that question. He hasn't testified how fast he was going; and the question leaves out of consideration the fact that he skidded the wheels at the time he applied the brakes. I think those should be in.

Mr. Meyer: First of all, he couldn't expect the wheels to do anything but skid when the brakes were fully applied.

The Court. Speed.

Mr. Meyer: Speed, I think, is a proper objection. I will ask Mr. Jackson about that.

Mr. Mackall: You are assuming the wheels did skid?

Mr. Meyer: I am assuming they would skid when the brakes were fully applied and ran 39 feet.

Mr. Mackall: By skidding, I mean locked, slid along the rail.

Mr. Meyer: If the brakes operated, I guess they locked. Let's ask the witness.

By Mr. Meyer:

Q. Mr. Jackson, when you put the brake on full, as you described, did the brakes grab hold and lock? A. Yes, sir.

Q. All right, now answering Mr. Mackall's question out of order here, from there on, during the 39 feet that
239 it went after you applied your brakes, were the brakes locked? A. Yes, sir.

Q. I assume, then, that the car skidded, as he puts it, went along the rails without turning, if that is skidding? A. Yes, sir.

Q. All right. Now, you said you started from a stop a few rails east of the point where you applied the brakes; is that right? A. How is that?

Q. You started from a stop when you started the motor car and the truck, that that was a few rails east of the point where you finally applied the brakes; is that right? A. Yes, sir, that is right.

Q. Can you give us an estimate of how far it was in feet from the point where you started the car to the point where you applied the brakes? A. It was about 195 from where I started off to where we had the accident. When I applied my brakes—about 20 feet before I ran over the dog. It skid that far.

Q. About 175, feet, then, from the time that you started? A. (Witness nods assent.)

Q. Now, you started from a standing stop, and I suppose you were accelerating, you were going faster as
240 you moved along; is that right? A. Well, yes, I was picking up speed a little bit. Couldn't pick up speed, only come a short distance. Those motor cars don't have any speedometer. I couldn't say exact what speed.

Q. That is what I was going to ask you. You don't have any method of telling how fast you were going? A. No, sir.

Q. Well, your best estimation, how fast were you moving at the time you pulled on the handbrake? A. Well, I figure around about 5 or 10 miles an hour.

Q. Now then, coming back to the question that I asked you before—

Mr. Mackall: If I may interrupt, there is one other element; you haven't asked him the grade, whether it was down hill.

By Mr. Meyer:

Q. Any grade there? A. A little down grade, yes, sir; just about the point of the accident, then you start up the grade again.

Q. All right. Now I want to take those same exact conditions that you had that day, as we have described them, both of us together with you. If you had the motor car alone, without the truck behind you, and you were
241 traveling at the same speed that you have indicated, having come from a standing stop, with the brakes in the condition that they were on that motor car, the only brakes that they had, on the grade that was there, with the turn and the low side on your left, as it was at that time, and with the condition of the tracks as it was, misty or moist, or whatever, it was, within what distance could you have stopped the motor car alone with the use of the handbrake? A. At the speed I was traveling, I could have stopped in about 6 to 8 feet.

Q. You are sure of that? A. Yes, sir.

Q. Now, what happened to you when the motor car went over? A. Well, laid there in the ditch until they picked me up. These two men picked me up and laid me on the platform.

. . . . . .

3 Q. Now, Mr. Jackson, continuing with your testimony where we broke into it the other day, will you be good enough to tell the Court and the Jury whether it was your regular custom in your work to pull this truck with the motor car? A. Yes.

Q. How frequently did you have to do that? A. About only once in awhile when we had some kind of material to truck, of course, to cross ties and switches and rails.

Q. Now, when you had that sort of material which had to be moved from place to place in your division, was there any other way that you had to move it except by putting it on the truck and moving it with the motor car pull-
4 ing it? A. There was a way on a work train. Sometimes we would have a work train unload it. Sometimes you put it where you wanted it.

Q. Did you ever have a work train assigned to you? A. No, sir.

Q. On the days when you used the truck did the man ever ride on the truck? A. Well, sometimes when we doubled up gangs, when we had more men than we could get on the motor car we had to put some of them on the truck.

Q. How many men would the motor car accommodate? A. Well, about ten or twelve men.

Q. On the motor car? A. Yes. You see you are not allowed to stand up on the motor car. You would have to sit down.

. . . . . .

6 Q. Was there any other method that you had of taking the coal down to Washington Grove station besides using the truck? A. No, sir.

Q. Approximately how much would you estimate that the load of coal weighed that you took down that morning?

. . . . . .

A. We had just put on what the truck would hold or we could get on it without rolling off.

Q. Would you tell us about how much that weighed? A. Oh, I guess around a ton or more.

Q. Now, how much approximately did the motor car itself weigh? A. Well, I couldn't tell you. I never weighed one.

Q. Can you give us an approximation? A. Yes, a little bit heavier than the truck.

Q. I don't recall whether on Thursday you told us what your estimate was of the weight of the truck empty. A. I told you with the tools we had on the truck and the weight of the truck it was about 1200 pounds.

Q. But empty, without the tools, about how much did the truck weigh? A. Well, it weighed around 800 pounds.

Q. Now, were you required in your use of the motor car or the truck or both to remove it from the main tracks at any time? A. What do you mean, how could we get it off or on?

Q. Did you have to take it off? A. Sometimes we did.

Q. And how was that done? A. By lifting. We always pick up one end of the motor car and walk around over to the rail and go back and lift the other end until it was at a crossing, and then it was off at the crossing.

Q. How often did you have to remove the motor car from the main tracks? A. Well, you had to do it every day to move it. When you got to where you was working at, you had to take it off.

Q. Now, would you have any extra men to help you in doing that or would the same gang that was working with you do that job? A. Well, sometimes we had extra men and sometimes we doubled up the gang.

Q. And how many men did you have with you that
8 day? A. Two.

Q. On that day when you got down to where you were working at Washington Grove crossing, did you remove the motor car from the tracks? A. Sure.

Q. How did you do it that day? A. After unloading the coal at Washington Grove Station and running it on down to the railroad crossing east of Washington Grove, and pull the motor car and truck off and let it sit there the balance of the day.

Q. Now, when you say you pulled it off, do you mean that the men actually pulled it themselves? A. Oh, yes, of course. They pick up one and run around and pull it on off.

Q. Did you help them do that? A. Yes, sir.

Q. The three of you did it? A. Yes, sir.

Q. How about the truck, did you remove that from the main line, too, that morning? A. Yes, sir.

Q. Now, when you finished work that afternoon, did you and your two men physically lift and move the motor car back onto the westbound main track? A. Yes, sir.

9 Q. And the truck also, did you physically lift that up and put it back on the main track?

. . . . . .

19 Cross Examination

By Mr. Mackall:

. . . . . .

22 Q. And this motor car that you were driving at the time of the accident was assigned to you, wasn't it? A. At that section, yes, sir.

Q. That was your track car? A. Yes, sir.

Q. And you worked in the maintenance of way department of the railroad; didn't you. A. That is right.

Q. And this track car was part of the maintenance of way equipment, wasn't it? A. Yes.

Q. This track car you were driving on the day of the accident was a Mudge track car, wasn't it? A. That is right.

Q. How many wheels on this track car ran on the rails? A. Four.

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110 Further Cross Examination

By Mr. Mackall:

• • • • • • • • • • •

111 Q. I see. When we interrupted yesterday, we were talking about the motor track car that was assigned to you; do you remember? A. Yes.

Q. And I believe you stated that was a Mudge belt-drive track car; is that right? A. It was a Mudge, yes, sir.

Q. And that track car is part of the Maintenance-of-Way Department; isn't it, equipment in the Maintenance-of-Way Department? A. Yes, sir.

Q. That is the department you worked in; is that right? A. That is right.

Q. I show you this picture—

The Court: Have it identified.

Mr. Mackall: I ask that this be identified as Defendant's Exhibit No. 10.

(Whereupon the said picture was identified as Defendant's Exhibit No. 10, for identification.)

112 By Mr. Mackall:

Q. Mr. Jackson, is this substantially the same as the motor car you were driving on the day of the accident? A. It looks like it, yes, sir.

Q. That car has four wheels that run on the track; doesn't it? A. Yes, sir.

The Court: Are you asking about Defendant's Exhibit—what is the number?

Mr. Mackall: No. 10.

The Court: Very well.

Mr. Mackall: I am asking him about the car he was using.

By Mr. Mackall:

Q. The motor car you were using the day of the accident, which I believe you said was substantially the same as that car on the picture. A. It looked like the same type.

Q. About how many men does that carry? A. Well, I think you can get about 10 or 12 men on it.

* * * * * * * * * *

Q. Now, those men would sit on this seat along here? A. On each side of it.

113 Q. On each side, with their backs against this rail; is that right? A. Yes, sir.

Q. And their feet on this step down here; is that right? A. That is right.

Q. What are these two levers sticking up? A. One is your clutch; one is your brake.

Q. Can you tell which one is the brake lever? A. The one this way.

Q. This one (indicating)? A. No.

Q. This one (indicating)? A. That is right. You don't have the pencil on the brake lever.

Q. This? A. Yes, that is it.

Q. Suppose we mark that "A." That is the brake lever; is that right? A. That is right.

Q. And the other lever is the clutch lever? A. The clutch lever.

Q. Suppose we mark that "B." Could you carry tools on that car, that motor car? A. Yes, sir.

114 Q. They went underneath the seat? A. Well, would be laid on the running board.

Q. On the running board underneath the seat? A. A little trough there. A board right over the wheel. That is to keep the water and stuff from flying up if the rails are wet. A little trough between that board over the wheels and the frame of the car.

Mr. Mackall: I will ask that this picture be marked as Defendant's Exhibit 11.

The Clerk: Defendant's Exhibit No. 11.

(Whereupon the said picture was marked Defendant's Exhibit No. 11, for identification.)

* * * * * * * * *

Q. Mr. Jackson, this is not an identical motor track car, but that is substantially the same as your car; isn't it? A. Well, it is about the same in the way. The way it is made, it is made different.

Q. Yes, but that is the general idea; isn't it? A. That shows the way you carry tools.

Q. That shows how the men sit on the car? A. Yes, sir.

115 Q. With their backs against that rail and their feet on—you call that—the running board? A. Well, I would. It is a kind of board over the wheels.

Q. I see.

The Court: I don't know whether the Jurors can see it at that distance. I suggest you pass it around and let them see it.

Mr. Mackall: It hasn't been introduced in evidence, Your Honor.

Mr. Meyer: It is all right. Give it to the Jurors now.

(Whereupon the exhibit was passed among the Jurors.)

By Mr. Mackall:

Q. How do you stop that motor car? A. How do you stop it?

Q. Yes. A. Releasing the clutch and pulling back on that brake lever.

Q. How do you release the clutch? A. Shove it forward.

Q. You shove that lever marked B on Defendant's Exhibit 10, you shove that lever forward; is that right? A. I don't understand you about those levers.

Q. Well, I am speaking of this lever right here. A. That is your clutch lever, yes, sir.

116 Q. You shove that forward? A. You shove that forward; that loosens your belt.

Q. That keeps the engine from pulling the wheels; doesn't it? A. Yes, sir.

Q. You pull back on this brake lever? A. That is right.

Q. Now, that motor car was assigned to you; wasn't it? A. Assigned to that section.

Q. You were responsible for the condition of that motor car? A. No, I was not responsible for the condition.

Q. I am sorry, I didn't hear your answer. A. No, sir, I wouldn't say I was responsible for the condition of it.

Q. Well, before you went out each morning, you tested the brakes; didn't you, as you were required to do under the rules? A. Yes, sir.

Q. And if the brakes weren't in good condition, you weren't supposed to take that car out; were you? A. That is right.

Q. The wheels of that car are made of steel; aren't
117 they? A. I judge they are steel.

Q. Of course, they run along the steel rails? A. On top of it.

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Q. Now, at any given speed, you can stop an automobile in a much shorter distance, can't you, than you can this motor car? A. I don't know as you can.

* * * * * * * * * *

Q. Now, how often did you check and test the
118 brakes on this motor track car? A. Well, every time you use it.

Q. Every time you used it? A. Every time you used it, you had to use the brakes.

Q. Now, was the handcar that was involved in this accident also assigned to your section? A. Handcar?

Q. Yes, the push car, the truck.

* * * * * * * * * *

Q. What do you call that four-wheel car that you had on the back of your motor car at the time of the accident? A. We call it a push car, a push truck. A handcar is like

we used to have before we had motor cars, then old pump up and down.

Q. You call it a push car? A. Yes.

Mr. Meyer: Push-truck.

The Witness: Push truck.

119 By Mr. Mackall:

Q. That push truck was assigned to you that was involved in this accident, wasn't it, to your section? A. No, sir, wasn't assigned to me.

Q. Assigned to your section? A. No, push cars not assigned to no particular section.

Mr. Mackall: Please mark this Defendant's Exhibit 12.

(Whereupon the said picture was marked Defendant's Exhibit No. 12, for identification.)

By Mr. Mackall:

Q. Now, Mr. Jackson, is this push truck similar to the one that you were using the day of the accident? A. Yes, sir, except these cross-pieces. Two cross pieces across each end. That is the way they ship them out of the shop.

Q. You mean at the end? A. Come out in here, right over the top of the wheels; one on each end, with strap iron on top of them pieces. Most of these track foremen take that stuff off to make them lighter to handle. I always use it just like the railroad ship it out to me.

Q. I see.

Mr. Meyer: Mr. Mackall, do you mind if Mr. Jackson shows the Jury what the difference was between this exhibit and the car he was using?

120 Mr. Mackall: Suppose I put it down here where we can all see. Now, would you show the Jury, Mr. Jackson, what you were talking about to me?

The Witness: Shall I come down there?

The Court: Yes, step down there.

. . . . . .

The Witness: The car we had had two pieces go right across there, right over the top of the wheels, and a strap on top of it, holding it down. That made it a much heavier car.

(Whereupon the Witness resumed the Witness stand.)

By Mr. Mackall:

Q. That push truck had four wheels; didn't it? A. Yes, sir.

Q. I believe you stated it weighed, your push car weighed approximately 800 pounds empty; is that right? A. About that, yes, sir.

Q. You sometimes used that push car to carry rails; didn't you? A. Yes. When we had rails, we had to use that. That was the only way we had to carry rails on that push truck.

Q. How many rails could you carry on a push
121 truck like that? A. Well, it just depends. Depended on how many you needed.

Q. What is the most you could carry? A. Well, those trucks are built pretty strong. The capacity of those trucks is 10,000 pounds. That is 5 ton.

Q. So you could carry what, about 10 rails? A. Well, those rails, one of those rails weighs pretty close to a ton. They weigh 140 pounds to the yard.

Q. And they are 13 yards long; so that would be approximately 1800 pounds, wouldn't it, if my arithmetic is right? A. I didn't figure it up, but that is what they weigh. They weigh 140 pounds to the yard.

Q. All right. Now, you have never seen a push truck like that with brakes; have you? A. No, sir.

Q. You have never seen a motor track car like that with air brakes; have you? A. No, sir.

Q. Now, you testified you sometimes pulled that push truck with the motor car; is that right? A. That is right.

Q. When you got to the place where you were working, you took the motor car and the push truck off the track?

A. Yes, sir.

122 Q. That was so it wouldn't interfere with the running of the regular trains? A. That is right.

Q. Now, how would a crew of three men get that motor car off the track? How did you do that? A. Only at a road crossing.

Q. What would you do? I believe there are bars at the end, each end of that truck, aren't there, of the motor car? A. Yes, bar across each end of it.

Q. How would you get that motor car off? A. Would pick up the light end of it and walk around. Sometimes two men could lift that up; other man get on the hind end of it, swing back, swing the weight back, and that pulled some of the weight off the front end; walk around and put it on the rail.

Q. I see. Now, in your work, it was essential that you be able to get that car and push truck off the track; wasn't it? A. Sir?

Q. I say, that motor car wouldn't have been any good unless you could have taken it off the track; would it? A. I don't understand what you mean.

Q. Well, you had to take the motor car off the track, didn't you, to clear the track? A. Oh, sure, yes,

123 sir.

Q. And if you couldn't do that, the motor car wouldn't be any good; would it? A. No, sir.

Q. The same thing applies to the push truck; isn't that right? A. Yes, sir; had to get it off.

Q. Now, I believe you said you operated a motor car some forty-four years before the accident; is that right? A. Well, I first started operating motor cars in 1917.

Q. It was your regular practice, wasn't it, to operate a motor car and push car on rainy days, on misty days? Wasn't anything unusual about that; was there? A. Push car, you only use that when you needed it. When you had to use it.

Q. But if you needed it and it happened to be a rainy

or misty day, you went ahead, didn't you? A. If you needed, if you had to use it, yes, sir.

Q. Wasn't anything unusual about operating a motor car and push truck on a rainy day; was it? A. No, sir.

Q. That was just a standard procedure? A. How is that?

Q. That was just a standard procedure? That
124 was the usual way you worked; isn't that right?

. . . . . .

A. The way I usually worked?

Q. Yes. A. Yes, sir.

Q. That was, to take the motor car and push truck, if you needed it, even though it happened to be a rainy day? A. We used the motor car practically every day when we went any distance on the section. Time we worked around close to headquarters, we didn't take it, didn't use either the motor car or the push truck.

Q. But on a rainy day, if you needed the push truck and you needed the motor car, you always used it; didn't you? A. We used it, yes, sir.

Q. Right. Now, on the day of the accident, you were given the job of taking a load of coal to Washington Grove Station and then to work on the track east of Washington Grove Station; wasn't that right? A. That is right.

Q. Now, before you started out on the day of the
125 accident, did you inspect the brakes as you usually did? A. Yes, sir.

Q. And they worked in the usual fashion? A. Yes, sir.

Q. In their normal, natural maner; is that right? A. That is right.

Q. They were in good operating condition? A. Yes, sir.

Q. If they hadn't been, you wouldn't have taken the car out; would you? A. That is right.

Q. In order to find out whether they were in good condition, you made a stop with them; didn't you? A. Well, we had a little track built in the tool house, the rail running out to the side track. We shoved the motor car right

out on the sidetrack and put it on the side track and come down to the main track, the derailing, the switch; and you always had to stop at the derailing; and I would go in to the telephone, get my orders, come on out to the main track. Always know whether you had brakes or not, because you had to stop at the derailing.

Q. I see. Now, you loaded up with tools and the coal before you left; didn't you?

. . . . . .

126 A. The tools, we had them on the motor car, what tools we had, except the wheelbarrow and scoop shovels.

Q. So you had all the tools on the motor car? A. Except the wheelbarrows and scoop shovels, what we load the coal with.

Q. You had two jacks with you on that day? A. Three.

Q. Three. You had a couple of lining bars? A. I always carried more than a couple. I never taken tools—never strip a car; never taken all tools off the car. If a man was out—a lot of them come to the tool house at the next morning last minute, he wouldn't see where his tools on there; got on the job, be somebody short of a tool.

Q. But all the tools you had on that day you were able to put on the motor car except the wheelbarrow and the scoop shovel? A. I could have put them on there, yes, sir.

Q. That wasn't an unusually heavy load for the motor car? A. No, sir.

Q. Or the load of coal and the load of tools wasn't an unusually heavy load; was it? A. No wasn't un-

127 usually heavy load, no, sir.

Q. That push car could carry as much as 10,000 pounds; couldn't it? A. That was the capacity of it, yes, sir.

Q. And I think you testified that you had about a ton of coal on there? A. Well, about. Put on all we could pile

upon it. Some rolled off. I couldn't tell you exact how much it was.

Q. I think you testified you guessed it was about a ton. A. Heavy stuff. Don't take too much coal to weigh a ton.

Q. Now, had you operated the motor car and the push truck on rainy days before with a load similar to this? You had; hadn't you? A. I don't know if I had unless we got caught out and come in.

Q. I am talking about going out. A. No, sir, not the truck.

Q. Now, had you operated a motor track car and push truck before with that amount of tools? A. Yes, sir.

Q. And an empty push truck? A. Yes, sir.

128 Q. You have? A. Yes, sir.

Q. You took the coal to Washington Grove Station and unloaded it; didn't you? A. Yes, sir.

Q. Didn't you get the wheelbarrow from the station? A. We carried the wheelbarrow down from Gaithersburg with the coal.

Q. You took it with you? A. Yes.

Q. Then you went down to Washington Grove crossing and took the car and the truck off the tracks? A. That is right. Stopped about half way between the station and the crossing and unloaded the tools; went down in the center ditch where we were going to work at and went on down to the crossing and unloaded the motor car and truck and walked back up.

Q. At the place where you were working, is there a tower to unload mail bags? A. There was a mail crane.

Q. A mail crane? A. To catch mail, hang mail.

Q. If the train goes by without stopping, they can catch the mail bag off? A. Yes, sir. Started right this end of that, east end of it.

129 Q. You started working just about where that mail crane was? A. Right along about there, went on there and worked east.

Q. Away from the station? A. Away from the station, yes.

Q. Now, at quitting time, you went back and got the motor car and the handcar; didn't you? A. Went back and got the motor car and the truck at quitting time.

Q. Before you did that, you got a clearance from the train dispatcher? A. Oh, yes, always do that.

Q. That is, by telephoning in? A. Yes, sir.

Q. And you found out there was a freight train coming along behind you; didn't you? A. Yes; they told me was a freight due in.

Q. Now, after you loaded up the tools and got the men on, you headed west toward Gaithersburg; didn't you? A. Yes.

Q. And you were going home; you were all through work? A. Yes, sir.

. . . . . .

130 Q. You didn't plan to stop at Washington Grove Station? You were going on through; weren't you? A. Yes, sir.

Q. In other words, you were headed for the barn; isn't that right? A. At Gaithersburg.

Mr. Mackall: Will you mark this.

The Clerk: Defendant's Exhibit 13.

(Whereupon the said picture was marked Defendant's Exhibit No. 13, for identification.)

. . . . . .

Q. Mr. Jackson, what is that picture of, this Defendant's Exhibit 13, for identification? A. That is a picture of Washington Grove Station.

Q. And that is looking east; isn't it? I mean, looking west, excuse me. A. The way I am looking at it, it is west.

Q. That is the way you were going on the day of the accident? A. Yes, sir; going west on this track over here.

Q. On that track there. Suppose we put an arrow
131 there. That is the direction you were going? A. Yes, sir.

Q. And this is the station house here? A. Yes, sir.

Q. And this is the eastbound track? A. Yes, sir.

Q. Suppose I mark that. Now, is that the way it looked the day of the accident? A. Well, as near as I can remember. I can't tell about them trees, the same amount of leaves on it or not.

Q. This is in November, the accident. A. Shows the picture of the tracks and the building looks about the same.

Q. And the station was there and this shed over here and this crosswalk here was the same? A. Yes, sir.

Q. And this curb along the platform? A. Yes, sir.

Mr. Meyer: This arrow is the wesbound track?

Mr. Mackall: Right. Suppose I make that "westbound."

Mr. Meyer: I thought you might.

Mr. Mackall: Mark this.

The Clerk: Defendant's Exhibit No. 14, for identification.

132 (Whereupon the said picture was marked Defendant's Exhibit No. 14, for identification.)

By Mr. Mackall:

Q. Mr. Jackson, this is the same area looking in the opposite direction, this Defendant's Exhibit 14; is that right? That is looking east; isn't it? You have been by there many times, haven't you, Mr. Jackson? A. Yes, that is the same.

Q. And the station looks like this coming from the east? A. Here is your westbound.

Q. Right. And this is the eastbound? A. That is the eastbound.

Q. All right. Suppose I mark those tracks. And you were coming this way? A. Yes, sir.

Q. Suppose I put an arrow back here to show. A. Where did you make that arrow? You made the arrow on the eastbound track.

Q. This is the westbound; isn't it? A. Pardon me. Looked to me like it was in the eastbound.

Q. I want to be sure it is right. Is that right? A. That is right.

Q. O. K. Now, that second picture, Defendant's Exhibit 14, shows the conditions as they were at the time of
133 the accident in that time? A. That looks about the same, yes, sir.

Q. Now, you had taken the push truck with you to haul the coal down to the Washington Grove Station; hadn't you? A. Yes, sir.

Q. And you didn't need that push truck on the way home; did you? A. Well, always—when you take it out, you always take it back to the tool house.

Q. Well, don't you sometimes leave the push truck by the tracks overnight and you lock it up? A. Very seldom unless we are raising track.

Q. If you are going to be working in the same place, you would leave the push truck there overnight and lock it up? A. Very seldom ever know where you are going to work at.

Q. There have been occasions when you left the push truck out overnight? A. It has been left out, yes, sir.

Q. Right. Now, if there had been any reason for it, you could have left that push truck out overnight; couldn't you? A. I will you about the truth, sir. You never know when you are going to have a broken rail. Used to have rail racks, one on every mile of the track.

Q. Have what? A. Rail, emergency rail on every
134 mile of the track. Cut that out, and keep all the rail at the tool house. You have to have a truck at the tool house. Never know when you are going to have a broke rail. Got to have the truck there to load the rail up, get things moving as quickly as possible.

Q. If there had been anything wrong with the push truck, you could have left it out by the track overnight? A. How is that?

Q. I say, if there had been something wrong with the push truck, so you couldn't use it— A. If there had been

something wrong with it, would have had to leave it out; couldn't haul it.

Q. Right. As I understand your testimony, at the time you started home, the rails were wet and slippery; is that right? A. That is right.

Q. And, of course, the wheels of the motor car were wet; weren't they? A. Yes, sir.

Q. They had to be wet, also? A. Sure.

Q. Approaching the scene of the accident was down grade; wasn't it? A. Yes.

Q. Then after you got past where the accident
135 happened, it started up grade; is that right? A. That is up grade.

Q. When you started home with that push truck, with the load of tools you had on board, two men, with the rails wet and slippery, there wasn't any question in your mind that it was perfectly safe to do that?

Mr. Meyer: I object to that, sir. I don't think that is for him to decide. That is for the railroad to decide, Your Honor.

. . . . . .

The Court: I overrule the objection.

. . . . . .

A. Was it safe for me to do that?

Q. Wasn't any question in your mind that it was perfectly safe for you to start home; was there? A. Sure.

Q. You knew it was safe; you thought it was safe? A. Yes.

136 Q. Now, as you approached the station, was the motor pulling? I believe you said you were accelerating as you approached the station. In other words, you were going faster as you approached the station. A. Going fast?

Q. I say, you were going faster—you were trying to get up to your running speed? A. Just about the time—just before the dog started, I was beginning to speed up a little bit.

Q. The motor was pulling as you approached the sta-

tion; wasn't it? You had your clutch engaged? A. Yes.

Q. And the motor was pulling? A. Yes, sir.

Q. Where is the throttle on this picture of the motor car?

The Court: Step down there and show it. Stand to one side, Witness, so the Jurors can see it.

Mr. Mackall: Stand over here.

By Mr. Mackall:

Q. Is this the throttle here? A. Looks like it.

Q. Suppose we mark that "C," with an arrow. Now, as you approached the station, you weren't planning
137 to stop; were you? A. What?

Q. You weren't planning to stop as you approached the station? You were going on home? A. Not before I approached the station, no, sir. I didn't try to stop until the dog started—

Q. Where was the dog when you first saw him? A. When I first saw the dog? When we loaded up the tools, the dog was walking around behind the station there. When we come down, he was standing right along beside the office window there at the station.

Q. Is that the bay window that sticks out? A. Yes, sir.

Q. Where were you when the dog was standing by the bay window? Where was your car, motor car? A. Well, we was passing Washington Grove Station.

* * * * * * * * * * *

Q. At the time the dog was standing by the bay
138 window, where was your motor car, by that crosswalk, that wooden crosswalk across the tracks? A. About that wooden crosswalk.

Q. Well, were you at the crosswalk or past it, or where were you? A. I was just a little beyond the crosswalk.

Q. A little west of the crosswalk? A. A little west of the passwalk, yes, sir.

Q. At that time, I believe you said, the dog seemed well contented; didn't he? A. Well contented, standing there by the window, yes, sir.

Q. Had that dog ever chased your car before? A. No, sir.

Q. Any other dogs ever chased your car? A. Yes, sir; there used to be one there at Upper Hill that used to chase the car.

Q. You weren't expecting any trouble from this particular dog; were you? A. No, sir.

Q. He seemed well contented? A. Well contented is right.

Q. Now, I believe you testified that after that time, you looked forward the way you were going; you stopped
139 watching the dog; is that right? A. I taken my eyes off the dog to look in the direction I was going. Just at that—

Q. Right. And at that time, you were past that wooden crosswalk; you were west of that wooden crosswalk; weren't you? A. Yes, sir.

Q. You were sitting on the hind end of that motor car; weren't you, on the left side? A. Yes, sir.

Q. Did you have your hand on the throttle? A. You don't have to hold your hand on the throttle.

Q. You just had your hand on that rail? A. No, indeed. Just sitting up there. We didn't always hold to that rail.

Q. I see. Sometime after that, Dorsey hollered, "Go back," is that right? A. Just as I take my eyes off the dog to look in the direction I was traveling, Dorsey hollered, "Go back; go back." When I looked around, the dog was coming straight across the eastbound track.

Q. Now, at the time Dorsey hollered, "Go back," how far west of the foot crossing was your motor car? A. Well, just a little past the crossing.

140 Q. About 10 feet? A. No, about 20 feet. As soon as I saw the dog—

Q. The motor car at the time you heard Dorsey say, "Go back," was about 20 feet west of the foot path? A. Well, just about—hardly 20 feet.

Q. I am sorry? A. I say, just about 20 feet perhaps.

Q. About 20 feet. And at that time, you saw the dog crossing the eastbound track; is that right? A. It was coming across, yes, sir.

Q. Now, what part of the eastbound track was the dog on when you first saw it? Was he on the outside rail, the inside rail, or whereabouts on that eastbound track was he when you first saw him? A. Well, he was coming on the south rail.

Q. On the south rail? A. Yes, sir.

Q. That would be the rail nearest the station? A. Yes, sir.

Q. All right. How far was he from the crosswalk, about 20 feet? A. What, the dog?

Q. Yes. He was the same distance west of the
141 crosswalk as you were? A. Well, he might have been a little bit—I couldn't tell you exact.

Q. Well, was he a little bit further west or not as far west or just about the same? A. Well, where we struck the dog at, it was—

Q. I am not speaking about where you struck the dog. I am talking about where the dog was on the eastbound track in relation to that foot path at the time you first saw him on that track. Where was he at that time? A. Well, he was just about come across there right about opposite the motor car.

Q. About opposite the motor car? A. Yes, when I saw him.

Q. And the motor car at that point was 20 feet west of the foot path? A. About 20 feet, yes, sir.

Q. Now, that is when you first saw the dog crossing the track; isn't it? A. Yes.

Q. And that is the first time you had any idea there was any danger; isn't it? A. That is right.

Q. And at that point, when you were 20 feet west of the foot path, that is when you decided you had to do
142 something; isn't it? A. Started to braking it right as soon as I saw the dog coming; I grabbed my brake.

Q. Now, at that point, when you were 20 feet west of the foot path, that is when you decided to put on the brake; isn't it? A. When I saw that, I put the brake on as soon as I seen the dog.

Q. Before you put the brake on, you had to decide to do that; didn't you? A. What?

Q. I said, before you put the brake on, you had to decide to put the brake on? A. I hadn't decided to put the brake on until I saw the dog coming across the track.

Q. Right. When you saw the dog coming across the track, that is when you decided to put on the brake? A. That is right.

. . . . . .

144 Q. Now, Mr. Jackson, after you decided to put on the brake, what did you do? A. Put the brakes on.

Q. You didn't release the clutch; did you? A. Sure.

145 Q. Well, tell me what you did first? A. Released the clutch.

Q. You pushed the clutch forward? A. Yes, sir.

Q. How about the throttle; did you do anything with the throttle? A. Didn't have the throttle to worry about when you released the clutch.

Q. As soon as you released the clutch, you didn't bother about the motor; it wasn't going to pull any more? A. No, sir; didn't bother about the motor.

Q. As soon as you decided to stop, you put the clutch lever forward? A. Forward.

Q. That took about a second to do; didn't it?

Mr. Meyer: I object to that, Your Honor.

The Witness: Wouldn't take you long to do that. As quick as you can snap your finger.

The Court: He can ask him that. The witness can give his estimate.

By Mr. Mackall:

Q. As quick as you snap your finger, like that? A. Yes, sir.

Q. You had to put your hand on the lever? A. Yes, sir.

146 Q. Push it forward? A. Yes, sir.

Q. Take your hand off the lever and put it on the brake lever? A. That is right.

Q. And pull back? A. Yes. The throttle had a piece of metal on there, notch held it in place. Take your hand, slap it out of that notch, and it would fly loose.

Q. That is the throttle you are speaking of? A. The clutch.

Q. Let me understand what you did. Did you actually put your hand on the clutch lever? A. Yes, sir.

Q. And push it forward? A. Yes, sir.

Q. You let go of it; is that right? A. Oh, yes; wouldn't hold onto that.

Q. Let go of it and put your hand on the brake lever? A. Yes, sir.

Q. Pulled it back? A. Pulled it back.

Q. Would you say that was about as fast as three
147 snaps of the finger? A. Done pretty quick.

Q. Snap to put it on, snap to grab the clutch, snap to let go of it, snap to grab the brake lever? A. That is about right.

Q. Just about that long? A. I didn't time myself doing it.

Q. That is about right? About a second, isn't that right, before you had your hand on the brake lever? A. Well, it was hardly a second.

Q. I am sorry? A. It was hardly a second.

Q. Just about?

Mr. Meyer: He said it was hardly a second.

The Court: He said, hardly a second, as I understand him.

By Mr. Mackall:

Q. Then you pulled back on the brake lever? A. Both hands, everything I had; locked the wheels.

Q. Then you skidded along the tracks? A. That is right.

Q. Hit the dog? A. (Witness nods assent.)

Q. And the motor car derailed; didn't it? A. Derailed.

148 Q. After it derailed, did it bump along the ties a little way before it turned over? A. For a short distance, yes.

Q. Now, when you put on the brakes, they operated as they always did; didn't they? A. Yes, sir.

Q. And they locked the wheels? A. Locked the wheels.

Q. At that time, with the wheels locked, you slid along those wet, slippery rails; didn't you? A. Yes.

Q. And you hit the dog? A. I will tell you, I don't know—there was no part of the dog on top of the rails.

Q. I am sorry? A. I don't understand—was no part of the dog on top of the rails. I didn't feel the motor car when it raised up on the dog. The dog was laying between the two rails of the westbound track. I couldn't get up. I didn't see any part of the dog on top of the rails.

Q. That is when you were lying in the ditch between the tracks? A. That is right.

Q. Now, at that point, you were just about opposite
149 the west end of the station; weren't you? A. Yes; I was a little past the west end of the station, yes, sir.

Q. Well, let me ask you this. When you testified in your deposition, you said:

Mr. Meyer: What page, please?

Mr. Mackall: Page 19. In answer to a question where you hit the dog.

. . . . . .

Q. "Question: Approximately where was the dog when your motor car hit him? Answer: He was along in here.

"Question: Down toward the end of that platform? Answer: No, just a little bit—almost right opposite the corner of that station."

Is that what you said?

Mr. Meyer: Read the next question.

150 By Mr. Mackall:

Q. "Question: Just beyond the corner of the station? Answer: Just about the corner of the station. See that window."

Is that right? A. Where the dog was—you mean where the dog was hit at?

Q. Yes. A. It wasn't hit right opposite the window. You don't mean the office window?

Q. No, no, along about the corner of the station. The window by the corner of the station. Isn't that right? Do you want to come down here, Mr. Jackson? I believe when you were testifying, you were looking at this picture, a small copy of this picture.

If you will stand over here, the Jury can see. The window you are speaking of is this window here; isn't it, at the west end of the station? A. Yes, sir.

Q. And you were about opposite that window lying in the ditch; wasn't that right?

Mr. Meyer: That is not the question, if Your Honor please. The question is: Where he hit the dog. He said he was beyond the station when he was lying in the ditch.

151 The Witness: This side of the station.

By Mr. Mackall:

Q. Where you hit the dog was just about opposite that window? A. About opposite that.

Q. All right.

* * * * * * * * * *

152 Now, before you were taken to the hospital, you were lying in the ditch between the tracks; weren't you? A. Yes.

Q. What happened then right after the accident? A. What happened? I told one of the—I asked the man was the motor car clear of the eastbound track. It was hanging on over. And he said, Yes. I said: Well, one of you take

the flag and go back to the crossing—freight following me out of—they was trying to get the car off. I said: You two men can't get it off.

Q. You were concerned about that freight train that was following you; isn't that right? A. Yes, sir.

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156 Recross Examination

By Mr. Mackall:

Q. As you approached the station before the accident happened, you testified that you were picking up
157 speed; is that right? A. No, sir, not picking up speed.

Q. I am sorry, I can't hear you. A. I said just about time I got in that—just before the dog started to cross, I was picking up speed.

Q. You were picking up speed just before the accident? A. Before the accident, yes, sir.

Q. All right. Now, you were on your way home to quit work for that day; weren't you? A. On my way to Gaithersburg, headquarters at Gaithersburg.

Q. About what speed were you planning to run on your way home, about 30 miles an hour? A. Oh, no, sir.

Q. About what speed? A. Well, we never allowed to run the motor cars over 20 miles.

Q. Never over 20. Well, Mr. Jackson, at the time you passed through the station, weren't you traveling about 10 or 12 miles an hour? A. Well, I figure about between 5 and 10.

Q. Well, I am asking you if you weren't actually traveling about 10 or 12 miles an hour? A. Well, I couldn't
158 tell you exact. Those motor cars don't have any speedometer.

Q. Don't have any speedometer? A. Don't have any speedometer, no, sir.

• • • • • • • • • • •

Q. Do you think you were going perhaps 10 miles an hour? A. Perhaps I would be doing around between 5 and 10.

* * * * * * * * * *

179 **Frederick H. Pflaging**

called as a witness by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

* * * * * * * * * *

180 Direct Examination

By Mr. Mackall:

Q. State your name, please. A. Frederick H. Pflaging.
The Clerk: Spell your last name, please.
The Witness: P-f-l-a-g-i-n-g.

By Mr. Mackall:

Q. Where are you employed, Mr. Pflaging? A. In Baltimore.
Q. By whom? A. Baltimore and Ohio Railroad.
Q. In what capacity are you employed? A. As an engineer, civil engineer.
Q. How long have you been so employed? A. Oh, around ten years or twelve.
Q. How long have you been a civil engineer? A. Well, since about 1920.
Q. Did you have occasion to examine and make measurements of the locale of Washington Grove Station? A. Yes, sir, I did.

181 Mr. Mackall: I ask that this plat be marked as Defendant's exhibit.
The Clerk: Defendant's Exhibit 16 for identification.

(Defendant's Exhibit 16 marked for identification.)

By Mr. Mackall:

Q. Mr. Pflaging, have you examined this plat known as Defendant's Exhibit 16? A. Yes, sir, I have.

Q. Have you checked this plat as to scale? A. Yes, sir, I have.

Q. How did you do that? A. Well, I checked—

Mr. Meyer: If your Honor pleases, we have no objection. If Mr. Mackall says this conforms to the actual facts, we will accept it without any further testimony.

Mr. Mackall: Thank you.

By Mr. Mackall:

Q. Now, Mr. Pflaging, what is the distance between the two sets of tracks? A. Do you want me to look at my notes?

Q. Yes.

The Court: Do you mean between the rails themselves?

182 Mr. Mackall: Yes. I mean what is the distance in the center of the two sets of tracks between the rails? Can you scale that off from this drawing?

The Witness: Yes, sir.

By Mr. Mackall:

Q. Would you do that, please? A. Yes, sir. There is seven-forty-five.

Q. You mean 7.45 inches? A. That is right—no, 7.45 feet.

Q. Excuse me, feet, I mean. That would be a little less than seven and a half feet? A. That is right. That is between the near rail of this track and the near rail of this track.

Q. Now, is this crossing, wooden platform crossing, correctly placed in relation to the station? A. Yes, sir, it is.

Q. Now, will you place a mark—would you point out the westbound tracks, please? A. Here.

Q. And they are marked westbound track on this plat? A. That is right.

Q. Now, would you point out the eastbound tracks? A. Right here, these two lines right here.

Q. Would you draw a line across the westbound tracks opposite the west end of the station? Now, I will

183 mark that "A."

Can we agree that that is the line opposite the west end of the station?

Mr. Meyer: Sure.

By Mr. Mackall:

Q. Now, will you draw a line across the westbound tracks, that is twenty feet west of this wooden platform crossing. A. This edge, you mean?

Q. From the west edge of this wooden platform crossing twenty feet west.

Q. Is this scale at the bottom of the plat correct? A. Yes, and that should be five feet.

Q. You scale off twenty feet there and mark that.

Now, will you transfer that distance up west of this point here?

Now, will you draw a line across the track at that point, straight across here? A. At right angles?

Q. Right.

All right, now I will mark this second line "B." That line "B" represents twenty feet west of the wooden platform crossing; is that correct?

Mr. Meyer: That is what the witness says.

By Mr. Mackall:

184 Q. Now, Mr. Pflaging, if you wanted to determine other distances on this plat, how could a layman do that? A. Well, here is the scale here. You take scale 10 or 5 or whatever you want, and you lay it along here.

Q. You are using the scale at the bottom of the plat? A. That is right.

Q. All right. A. Then you would transfer it up there, use your relative distance up here.

Mr. Mackall: I have no further questions.

* * * * * * * * * *

Kenneth Chrissinger

called as a witness on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

* * * * * * * * * *

186 The Court: Yes. As I understand it, if the question is whether the lack of air brakes was to any extent the cause of this accident—you are claiming that there are no air brakes?

Mr. Meyer: That is correct, sir.

The Court: And as I understand the decision of the Court is that if the accident is in any way attributable to the failure to comply with these regulations, then it is negligence.

Mr. Meyer: And there is absolute liability on the railway?

The Court: Yes, if the absence of the air brakes had anything to do with the cause of the accident to any extent, and for that reason the question is if it had air brakes, how long would it have taken to stop it. I think it is competent.

Mr. Meyer: You are taking it subject to my objection.

The Court: Yes, sir.

(Whereupon, counsel returned to the trial table and the following proceedings were had in open Court:)

Direct Examination

By Mr. Mackall:

Q. Will you state your name, please, and spell it
187 for the reporter? A. Kenneth C-h-r-i-s-s-i-n-g-e-r.

Q. Where are you employed? A. Westinghouse Air Brake Company in New York City.

Q. What railroad brake equipment is manufactured by your company? A. Just about all railroad equipment for freight cars, passenger cars and locomotives and motor cars.

Q. What are your duties with respect to railroad brake equipment? A. To call on railroads and assist them with any problems they have with respect to air brake equipment, to indicate equipment to be applied to new cars being considered and in general to help them with any problems on air brakes.

Q. Do you recommend to individual railroads brake equipment necessary for new rolling stock built by the railroads? A. Yes, I do.

Q. Now, Mr. Chrissinger, is there any limit on the amount of braking power which can be applied to the wheels of the particular piece of track equipment? A. Yes, there is.

Q. And what then determines that limit? A. What determines that is the amount of force that will make a wheel slide. When a wheel locks and slides, it lengthens the stop. So the idea is to apply just enough force
188 that will give you the maximum retardation but will not lock the wheel.

Q. Now, if the brakes on a particular piece of equipment are capable of locking the wheels, what does that fact indicate with respect to brake power available to the operator? A. That indicates that you have more braking power than you can safely use.

Q. Now, if the operator can lock the wheels with the existing brakes, will increasing the brake power increase the efficiency of the brakes? A. No.

Q. What effect will it have? A. It will have no effect, except that if you lock wheels you will lengthen your stop.

Q. Can you say that the more power you have available, the more likely it is that you will lock the wheels? A. Yes, if you exceed the maximum retardation that you can apply to that certain vehicle.

Q. Now, how does moisture—the fact that rails are wet and slippery—affect stopping distances generally? A. Well, it lengthens the stopping distances in this manner; that it lowers the rail adhesion between the wheel and the rail, which limits the amount of force that you can apply to the wheel before it will lock.

189 Q. And the lower the adhesion the less braking power you can safely apply without locking the wheels; is that correct? A. That is correct.

Q. Now, what effect does locking the wheels on wet and slippery tracks have? A. Well, the same effect as on dry rail. It lengthens the stop.

Q. What happens when you lock the wheels on wet tracks? A. Well, it would lengthen the stop more than it would on

dry rail, because the water or material, such as leaves or anything that is on the track act as a lubricant between the wheel and the rail.

Q. Mr. Chrissinger, do you know of any railroad rail equipment equipped with air brakes which could stop that equipment in six to eight feet at a speed of ten miles per hour?

Mr. Meyer: I object to that, your Honor. There is nothing to indicate this man knows anything about this type of equipment.

Mr. Mackall: I am not asking about this type of equipment. I am asking about any type of railroad equipment.

Mr. Meyer: We are not interested, your Honor, in any other type of equipment.

The Court: I overrule the objection.

190 The Witness: Will you restate the question, please?

(The pending question was read by the reporter.)

The Witness: No.

By Mr. Mackall:

Q. What effect would wet and slippery rails have on the answers you have just given? A. Wet and slippery rails will tend to lengthen your stop.

Q. Now, do you know of any railroad rail equipment equipped with air brakes which could be stopped in six to eight feet from a speed of five miles an hour traveling on a slight downgrade with wet and slippery rails? A. No.

Mr. Meyer: I object to that, your Honor, for the same reason.

The Court: Overruled. Proceed. I overrule the objection.

* * * * * * * * * *

191 Q. Now, in your opinion, Mr. Chrissinger, would the motor—strike that. In this case we are concerned with a piece of equipment known as a motor track car.

This is a picture of it, known as Defendant's Exhibit 10. Have you ever seen such a piece of equipment? A. Oh, I have noticed the equipment on railroads. I have never inspected a piece of equipment like that.

TheCourt: Let me speak to counsel at the bench, please.

(Whereupon, counsel approached the bench and the following proceedings were had out of the presence of the jury:)

The Court: Isn't the question simply this; could a vehicle of this kind, eqipped with air brakes, could it be stopped in a shorter distance than with the brakes it has on it?

Mr. Mackall: I was approaching that question now.

Mr. Meyer: In the first place, your Honor, this witness has no basis for any more knowledge of that than the Court or the jury.

The Court: I don't expect that.

Mr. Meyer: He has no experience in it at all.

The Court: I disagree with you. You have not shown by your testimony that had this been equipped with
192 air brakes it could have been stopped in any sort of distance.

Mr. Meyer: We have shown that if it hadn't had to pull a heavy truck, it could have been stopped in a shorter distance—that is the issue—even with its own brakes, even the same type of brakes, your Honor.

The Court: If it could have stopped as quickly with this as with air brakes, then the lack of air brakes would have nothing to do with the accident.

* * * * * * * * * *

193 Q. In your opinion, Mr. Chrissinger, would the motor track car and the hand car involved in this case have been stopped with hand brake equipment in six to eight feet from a speed of ten miles per hour traveling on a slight downgrade on wet and slippery track?

194 Mr. Meyer: That is objected to, your Honor.

The Court: Overruled.
The Witness: In my opinion, no.

By Mr. Mackall:

Q. In your opinion could the motor track car and hand car involved in this case have been stopped with hand brake equipment in six to eight feet traveling on a slight downgrade on wet and slippery rails at the speed of five miles per hour?

Mr. Meyer: That is objected to, your Honor.
The Court: Overruled.
The Witness: In my opinion, no.

By Mr. Mackall:

Q. Now, Mr. Chrissinger, if a piece of rail equipment could be stopped in six to eight feet from a speed of ten miles per hour, how would a stop affect the occupants of a car such as this? A. Well, to make a stop of that nature the acceleration rate is so high, I would expect you would be dislodged from your seat.

Q. What do you mean "dislodged from your seat"? A. Well, thrown out of your seat.

Q. Mr. Chrissinger, what is meant, briefly, by application time with reference to air brake equipment? A. Well, an application of air brake equipment is made
195 by reducing pressure in a line which reduces pressure on one side of the piston which had equal pressure on the other side and your piston moves and connects air volume to a brake cylinder and that volume in the reservoir has to flow through the piping in the air cylinder and apply the brake cylinder. That is what is meant by application time.

Q. Is application time the time from the point when you put the brake lever in the stop position and the time when the brake first start going on the wheels, the brake shoes? A. Yes, although we should clarify that a little. It is the application time from the time you put the brake

valve or operating lever into application position to the time you receive an effective brake. What I mean by an effective brake, it will take probably ten pounds of cylinder pressure to get the brake shoes up against the wheels and that is effective.

Q. Now, what is the application time for air brake equipment?

Mr. Meyer: I object to that, your Honor.

The Court: I overrule the objection.

The Witness: Well, for modern, light-weight coach equipment, the application time on the minimum side would be a second and a half.

Q. Do you know of any railroad equipment which
196 has a shorter application time than the modern light-weight coach?

Mr. Meyer: I object to that, your Honor.

The Witness: No.

By Mr. Mackall:

Q. How many feet per second, Mr. Chrissinger, does a car going ten miles per hour travel?

The Court: That is a mere matter of arithmetic.

Mr. Mackall: It is a mere matter of arithmetic, but I think I have to establish that, and I think the witness is qualified to testify.

The Court: I think anybody is qualified to testify to that.

Mr. Mackall: I think so, too.

The Witness: The miles per hour times the constant 1.467, which would give you about 14⅔ feet per second.

By Mr. Mackall:

Q. And at five miles per hour, how far would a car travel in one second? A. About 7⅓ feet.

The Court: Is a rough approximation about a time and a half; isn't it?

The Witness: The rule of thumb is one and a half.

By Mr. Mackall:

Q. How far would a car going ten miles per hour travel between the time the brake lever is put in the stop
197 position and the time that the brakes begin to have any effect whatsoever?

Mr. Meyer: I object to that, your Honor.

The Court: I overrule the objection.

The Witness: It would be approximately twenty-nine feet or a little better.

By Mr. Mackall:

Q. Now, I would like to ask you the same question at a speed of five miles per hour. How far would the car going five miles an hour travel between the time the brake lever is put in the stop position and the time the brakes begin to have any effect whatsoever?

Mr. Meyer: Objected to, your Honor.

The Court: Overruled.

The Witness: Approximately 14⅔ feet.

By Mr. Mackall:

Q. What is known as operator's reaction time? What is that? A. Well, operator's reaction time is taken as the time that the operator first becomes aware of a situation and then his reaction time to reach the brake valve to begin his application.

Q. Is that the time it takes the operator to decide to put on the brakes and actually move the lever? A. It is the time that it takes for the man actually to de-
198 cide to put on the brakes.

Q. And actually start to move the lever, is that right? A. That is right.

Q. Now, what reaction time—strike that. What is the reaction time for an average individual as used by your company?

Mr. Meyer: I object to that, your Honor.

The Court: Overruled.

The Witness: Well, we use in the neighborhood of a second to a second and a half.

By Mr. Mackall:

Q. All right. How far would a car—strike that. How far would a car going ten miles per hour travel during the operator's reaction time?

Mr. Meyer: Objected to, your Honor.

The Court: Overruled.

The Witness: Well, it would be between fourteen and two-thirds and twenty-one and two thirds feet.

By Mr. Mackall:

Q. Now, how far would such a car—strike that. How far would a car going five miles per hour travel during the operator's reaction time?

Mr. Meyer: That is objected to, your Honor.

The Court: Overruled, although I think it is useless.

. . . . . .

199 The Witness: Well, it would be between seven and a third and ten and a half feet.

. . . . . .

200 Q. The question is how far would a car going ten miles per hour travel between the time that an individual realized it was necessary to apply the brakes to the time the brakes had any reaction whatsoever? A. It would be approximately forty-two feet.

Q. How far would it travel under the same situation at five miles per hour?

Mr. Meyer: Objected to.

The Court: Overruled.

. . . . . .

The Witness: Approximately 21 feet.

. . . . . .

202 Cross Examination

By Mr. Meyer:

Q. Mr. Chrissinger, a light-weight passenger car is the smallest railroad equipment that your company works on? A. No, I wouldn't say that. You mean small in weight?

Q. Yes. A. Weight, length or—

Q. Yes, weight. A. Weight, I would say would be maybe a freight car.

Q. Freight car. Does the weight of the vehicle have anything to do with the stopping distance? A. No, for this reason; the heavier a vehicle the more rail adhesion you have simply because there is more pressure, which is pushing that wheel against the rail, and the more braking power you can safely put to that car. The braking power is always supposed to be known as the braking ratio which is the light weight of the car to the force applied. In other words, the heavier the vehicle, the more breaking force you can use.

Q. So you could stop a big heavy diesel engine in the same distance you could stop a light passenger car?

203 A. That is right.

Q. Now, could you stop a diesel engine in the same distance that you could stop the same engine pulling ten cars behind it? A. You will have to clarify that. Do you mean with air brakes cut through the ten cars or without?

Q. I am talking about the diesel engine having the air brakes but the cars not having any brakes. A. No, you could not stop it.

Q. You couldn't stop it, so that the weight of the cars behind it would have something to do with the distance within which you could stop the engine with the air brakes? A. Any unbraked portion of your train is going to have an effect on your stopping distance.

Q. Let's clarify that very, very simply. Any unbraked portion of equipment behind the motored unit will add to

the stopping distance of the entire train, let us say, wouldn't it? A. Oh, yes, very definitely.

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204 Q. And there must be some reason why they put air brakes on the trailers pulled by those tractors; isn't there? A. Yes, sir.

Q. What is the reason for that? A. Well, I am not qualified to talk, except from the point of view of logic that anybody would be qualified to talk. I don't want to set myself up as an expert on trucks.

Mr. Mackall: I object.

• • • • • • • • • • •

The Court: I sustain the objection.

By Mr. Meyer:

Q. In other words, there are sanding apparatus on the vehicles that when the brake is applied dump the sand in front of the wheels? A. There is a sanding ap-
207 paratus on locomotives. There is some on some light weight cars.

Q. Will that help stop the vehicle? A. Yes.

Q. Now, when you talked about hand brakes, in answer to some of Mr. Mackall's questions, are they air brakes? A. No, they are not.

Q. What experience do you have with hand brakes? A. No experience.

• • • • • • • • • • •

Q. What about if the sand is dropped before the wheel is locked? A. That may have the tendency to keep the wheels from locking.

• • • • • • • • • • •

208 Further Direct Examination

Mr. Mackall: Your Honor, I am going to need the help of the reporter in using this witness now. I would like her to give me these stopping distances, or rather the distances that Mr. Chrissinger testified a car traveling at five and ten miles an hour would travel, which was the last

question I asked on that matter, to get the number of feet and also the one question preceding that.

. . . . . .

210 "Q. The question is how far would a car going ten miles per hour travel between the time that an individual realized it was necessary to apply the brakes to the time the brakes had any reaction whatsoever.

"A. It would be approximately forty-two feet.")

By Mr. Mackall:

Q. Mr. Pflaging, will you take your scale and scale from that scale on that plat a distance of forty-two feet? A. From where?

Q. I just want the distance forty-two feet. A. Forty-two feet from where?

Q. Will you mark on this piece of paper to forty-two feet on this scale here? Use this scale here. A. I don't know if that is exactly accurate. This is forty feet right there.

Q. It is forty feet from here to here? A. Yes,

211 it is.

Q. I want you to mark on the edge of this paper. Don't use your scale. This should be over here a point, shouldn't it, over here? All right get it exactly right now.

Would you watch this, please, Mr. Meyer?

Mr. Meyer: I assume that being an engineer he knows how to scale forty-two feet.

Now, would you take that distance and cut a strip from this piece of red material that is forty-two feet long from this end.

The Court: You had better have that identified now.

Mr. Mackall: I am going to take this strip that Mr. Pflaging just cut off showing a distance of forty-two feet and put it on that plat here.

The Court: You had better have that identified now.

The Clerk: That will be Defendant's Exhibit No. 16-A.

(Defendant's Exhibit 16-A marked.)

The Court: What is the scale of that map?

The Witness: One inch equals five feet.

The Court: Five feet to the inch.

The Witness: I am used to using this scale.

Mr. Mackall: Let the record show that I am placing this red strip on the plat with the left end opposite—strike that. I am placing this red strip with the right end
212 opposite the east end of this wooden platform crossing.

Now, will you read the next question and answer, please?

(Whereupon, the reporter read the question and answer, as follows:

"Q. How far would it travel under the same situation at five miles per hour?

"A. Approximately 21 feet.")

By Mr. Mackall:

Q. Now, that is half the forty-two feet, isn't it, Mr. Pflaging? A. Yes, sir.

Q. Will you take this piece of paper that you have marked forty-two feet and fold it so you get half that distance? A. Do you want me to cut it?

Q. No.

Now, will you mark where that fold is? Will you use that as a guide and cut off a strip of this red material 21 feet long?

Mr. Mackall: Mark this Defendant's Exhibit 17.

The Clerk: That will be defendant's Exhibit 17, for identification.

(Defendant's Exhibit No. 17 marked for identification.)

213 Mr. Mackall: Let the record show that I am going to place this on the plat with the left end of this at the line designated at Position "A."

* * * * * * * * * * *

215 Mr. Mackall: I have another witness from the Justice Department, Mr. Leo Meltzer. Perhaps we can save a little time.

If called, he would testify that the Justice Department, under the law, has the function of prosecuting violations of the Safety Appliance Act; and since he has been with that part of the Justice Department—and he is with the branch of the Department which is concerned with prosecuting such violations—the Department of Justice has never prosecuted any cases involving the type of equipment involved here for violation of the Safety Appliance Act.

If we could stipulate that, we can save some time.

The Court: You want to stipulate that the Department has never prosecuted any case for violation of these particular provisions of the Act; is that it?

Mr. Meyer: On a motor car.

Mr. Mackall: As to the equipment involved in this case.

Mr. Meyer: I think I will stipulate that he will so testify. Will you state how long he has been with the Department?

Mr. Mackall: Between ten and fifteen years.

Mr. Meyer: We will so stipulate.

* * * * * * * * * *

274 **Court's Charge to Jury**

275 PROCEEDINGS

The Court: Members of the Jury, the Plaintiff, Daniel T. Jackson, has brought this suit against the Defendant, the Baltimore and Ohio Railroad Company, seeking to recover compensation for injuries which he claimed resulted from the fault of the Railroad Company.

His claim is based on two grounds: The first ground is the ground of negligence: that is, that he was injured by the negligent act or failure to act of the Defendant.

Now, negligence is simply this: It is a failure to exercise that degree of care which an ordinary prudent person would exercise at the particular time, place, and under the particular circumstances. Generally speaking, a person who is injured by that negligent act or failure to act is entitled to recover compensation from the one who was negligent.

Now, it is the obligation of the Railroad Company to furnish equipment for use of its employes which is reasonably safe for the purpose for which it was furnished, and for the purposes for which it was used.

Generally speaking, if the railroad fails to do that, and by reason of that failure, the employe is injured, the employe has a right to recover compensation.

276 Now, there is no presumption of negligence from the mere fact that an accident happened. The burden of proof is upon the Plaintiff to prove that the accident resulted from the negligent act of the railroad; that is, from the failure to furnish equipment that was reasonably safe for the purpose for which it was to be used; and if the Plaintiff was injured in consequence of that failure, then he is entitled to recover.

There is no question of what you may have heard in other negligence cases of contributory negligence or assumption of risk. The only question for you to determine there is whether or not the railroad was negligent, and the accident occurred by reason of that negligence.

Now, the other ground of recovery is based upon an Act of Congress known as the Safety Appliance Act.

Congress has required railroads to furnish certain equipment for the use of the operation of the railroad. Among those that are necessary—as in this particular case—was that the law required the railroad to have hand brakes on this truck, and to have brakes on the motor car controlling the brakes on both the truck and the motor car.

The evidence clearly showed, and it is admitted that this equipment was not furnished; and you will find, therefore, that if by reason of the failure to furnish that

277 equipment, this accident happened, that that was the proximate cause or a contributing cause of the accident, then the Railroad is liable to the Plaintiff; and no negligence on the part of the plaintiff, himself, is a bar to his right to recover under the Railroad Safety Appliance Act.

However, if you find for the Plaintiff on the first claim of negligence, then any contributory negligence on his part might be considered, not as a defense to the action based on negligence, but to be considered by you in determining the relative negligence of the two in determining the amount of compensation for the Plaintiff.

Now, these are facts for you to determine; for you, alone; for you are the exclusive judges of the facts; and you are not bound by any statement of my own as to the facts in the case. They are for you to determine and you, alone.

Your duty is to follow my instruction as to the law, but the facts are your province and not mine.

Now, you are the exclusive judges of the credibility of the witnesses who have testified before you. You should take into consideration the manner of testifying, whether a witness is frank or evasive in answering, whether the testimony of a witness is consistent as a whole, or consistent or inconsistent with statements which the witness may have made at some previous time, whether under oath or not.

278 You should consider the interest that a witness has in the result of this case, whether as a party, or by reason of friendship or any other fact, or any fact developed in the testimony which your minds might tend to bias or color the testimony of a witness.

You heard the testimony of experts giving their opinions as to certain facts. Now, as to those opinions, you are not bound by the opinion of an expert; but you should give it such weight as you think is due it, in view of the knowledge and experience of the expert.

Now, the burden is upon the Plaintiff to show the liability of the Defendant, either on the question of negligence, which I discussed at first, or by reason of the violation of the Safety Appliance Act. That is to say, whether or not the evidence as a whole, in your minds, bears favorably one way or the other.

It is not a question, as in a criminal case, of showing the proof of a fact beyond a reasonable doubt; but is simply the greater weight which the evidence has one way or the other.

Now, taking all these matters into consideration, consider first on the question of negligence alone whether or not the Plaintiff has shown that the Defendant was negligent in furnishing the equipment which it did for
279 the purpose for which it was to be used; and whether or not that fact was the cause, the proximate cause, or a contributing cause of the injury to the Plaintiff.

If the Plaintiff has not shown that by the greater weight of the evidence, why, of course, he could not recover under that claim.

Then consider the other question, the Safety Appliance Act. The burden of proof there is upon the Plaintiff to show that the failure to furnish the brakes, the hand brakes on the truck, and the brakes on both vehicles which could be controlled on the motor car, whether that was a cause or a contributing cause of the accident.

If the Plaintiff has not shown that by the greater weight of the evidence, he could not recover under that claim.

But if you find that the Plaintiff has sustained or shown by the greater weight of the evidence that his injuries were caused by the negligent act or failure to act of the Defendant, or by failure to equip this motor car and truck with brakes such as I have described, then your verdict should be for the Plaintiff.

If he has not shown either that his injuries were caused by the negligent act or failure to act on the part of the Defendant, or by the failure to provide this motor car and truck with the equipment required by law, then
280 your verdict should be for the Defendant.

If you find for the Plaintiff, you should fix such sum of money as in your minds would fairly, reasonably and adequately compensate him for the injuries which he suffered, for his mental and physical suffering, for any

loss of wages, or loss of earning power; and if that is likely to continue in the future, take that into consideration in fixing the amount of his recovery.

If you find for the Plaintiff solely on the ground of negligence, if you find the Defendant has shown by the greater weight of the evidence that the Plaintiff, himself, was negligent, and that his negligence was the contributing cause of the accident, then you should take that into consideration in balancing the negligence of the two, in determining the amount of recovery to the Plaintiff.

If counsel have any further objections, set to the bench and I will hear them.

* * * * *

The Court: I will ask the Jurors to retire and consider their verdict. Select one of your members as a foreman or forewoman, as the case may be; and when you have agreed upon a verdict, notify the Marshal at the door.

* * * * * * * * * *

Defendant's Exhibit 18

Filed December 9, 1955

STIPULATION

It is hereby stipulated by and between the parties to this action through their respective counsel of record, subject to objection as to admissibility, relevancy and materiality, that if called as a witness, Mr. R. G. May would testify as follows:

1. That he is Vice-President, Operations and Maintenance Department, of the American Association of Railroads.

2. That his duties are principally in connection with operations and maintenance problems of the American railroad industry.

3. That he has been connected with the American railroad industry for twenty-seven years.

4. That he is familiar with the type of railroad motor track cars and hand cars customarily used in the railroad industry in Maintenance of Way departments.

5. That he is familiar with the type of motor track car and hand car involved in this case.

6. That railroad motor track cars customarily used in the railroad industry in Maintenance of Way departments have four wheels; are capable of being removed from the rails by a crew of three or more men; are equipped with hand brakes and are not equipped with power brakes.

7. That the type of railroad motor track car involved in this case is substantially the same as the type of railroad motor track car customarily used in the railroad industry in Maintenance of Way departments.

8. That there are approximately sixty thousand of such railroad motor track cars currently in use in the American railroad industry.

9. That hand cars customarily used in the railroad industry in Maintenance of Way departments are equipped with four wheels; two axles; wooden frames; are capable of being towed behind railroad motor track cars and are not equipped with any kind of brakes.

10. That the type of hand car involved in this case is substantially the same as the type of hand car customarily used in the railroad industry in Maintenance of Way departments.

MILFORD MEYER
Milford Meyer
Attorney for Plaintiff

LAIDLER B. MACKALL
Laidler B. Mackall
Attorney for Defendant

3 **Excerpts from Defendant's Exhibit 19**

Wilbur J. Barnes

being first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Mackall:

Q. State your name, please. A. My name is Wilbur J. Barnes.

Q. Where are you employed, Mr. Barnes? A. I am presently associated with the Locomotive Inspection Service of the Interstate Commerce Commission in the capacity of supervising engineer.

Q. How long have you been employed at the Interstate Commerce Commission? A. Since June 12th in 1926.

Q. What are your duties as a supervising mechanical engineer? A. I have charge of all engineering in connection with the administration of the Locomotive Inspection Act and also of the specifications and alteration reports required to be filed under rules approved by the Commission governing all locomotives in use on common carrier lines within the continental United States.

Q. Briefly, what are those reports that you speak of?

4 A. The specifications are documents showing the pertinent construction features of the locomotives and of steam boilers on steam locomotives.

Just to continue, they also cover the pertinent constructional features of locomotives propelled by power other than steam.

Q. What use is made of these reports by the Commission? A. These reports are used to determine whether the details of the construction are in accordance with the requirements of rules approved by the Commission.

Q. Does the Boiler Inspection Act have any application to these reports? A. The reports are required by rules formulated under the Act and approved by the Interstate Commerce Commission.

Q. Is your Department concerned with railroad equipment other than locomotives? A. No.

Q. * * * Has any Interstate Commerce Commission order been issued concerning railroad motor track cars?

Mr. Meyer: That is objected to.

* * * * * * * * * * *

5 A. At the time of the promulgation of rules covering locomotives other than steam—

Q. Let me interrupt you for a minute. I am speaking of a rule or order of the Commission in force on November 1, 1951.

Mr. Meyer: That is objected to for the reason stated.

The Witness: To repeat, at the time of the approval of rules and instructions covering locomotives other than steam an order was issued by the Commission approving these rules and establishing the effective date.

* * * * * * * * * * *

Q. Now, are you familiar with any rule or order of the Commission effective on November 1, 1951, which mentioned railroad track cars?

Mr. Meyer: That is objected to for the reason mentioned.

The Witness: It was, and the order referred to in answer to the previous question established the definition of a locomotive and a motor car.

* * * * * * * * * * *

6 Q. Do you have a copy of that order with you? A. I have.

Q. Where did you get that order you have here? A. This order is part of the records of the Section of Locomotive Inspection.

Mr. Maekall: Will the reporter mark this as Defendant's Exhibit No. 4 for identification?

(The aforementioned document was marked Defendant's Exhibit No. 4 for identification.)

By Mr. Mackall:

Q. Mr. Barnes, will you read the first two paragraphs of this order, just these two. A. "At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of December, A. D. 1925."

Then the second caption reads:

"In the matter of rules and instructions for the
7 inspection and testing of locomotives propelled by other than steam power in accordance with the Act of February 17, 1911, amended March 4, 1915, June 26, 1918, and June 7, 1924."

Q. Mr. Barnes, what are those acts? How is that act designated? A. It is generally referred to as the Boiler Inspection Act, amended.

Q. Will you read the second paragraph appearing on page 2 of this document, Defendant's Exhibit No. 4 for identification? A. "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive."

Q. Now, Mr. Barnes, was this order in effect on November 1, 1951? A. Yes, it was.

Q. Has your department ever inspected, issued any regulations or taken any action with respect to railroad motor track cars? A. No, sir.

* * * * * * * * * * *

10 Now, just to conclude, in accordance with the stipulation previously made, the motion is made to strike the witness's testimony completely.

* * * * * * * * * * *

Defendant's Exhibit 4

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of December, A. D. 1925.

In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

It appearing, That the act of June 7, 1924 (Public No. 277, 68th Cong.), amending the act of February 17, 1911, makes said act apply to and include all locomotives used upon the line of any common carrier by railroad, or partly by railroad and partly by water, within the continental United States subject to the interstate commerce act, as amended, excluding street, suburban, and interurban electric railways unless operated as a part of a general railroad system of transportation. The act of February 17, 1911, as amended, requires among other things, that each carrier subject to its provisions shall file its rules and instructions for the inspection of locomotives and tenders with the chief inspector within three months after the approval of the act and after hearing and approval by the Interstate Commerce Commission such rules and instructions with such modifications as the commission requires shall become obligatory upon such carrier: *Provided, however,* That if any carrier subject to this act shall fail to file its rules and instructions, the chief inspector shall prepare rules and instructions not inconsistent therewith for the inspection of locomotives and tenders to be observed by such carrier, which rules and instructions being approved by the Interstate Commerce Commission and a copy thereof being served on the president, general manager, or general superintendent of such carrier, shall be obligatory and a violation thereof punished as provided in said act;

It further appearing, That by orders dated June 2, 1911, September 12, 1912, June 9, 1914, October 11, 1915, June 30, 1916, November 13, 1916, December 26, 1916, September 20, 1917, December 17, 1917, and April 7, 1919, we have approved rules and instructions for the inspection and

testing of locomotives propelled by steam power. It now becomes necessary under the amended act to approve rules and instructions for the inspection and testing of locomotives propelled by other than steam power which, for the purposes of this order, will be distinguished from multiple-unit cars and similar self-propelled vehicles designed to carry within themselves freight or passenger traffic by the definitions given in the classification of Train-Miles, Locomotive-Miles, and Car-Miles for Steam Roads approved by our order of May 19, 1914, as follows:

A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.

A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive;

And it further appearing, That conferences participated in by representatives of the carriers, representatives of the employees, and the chief and assistant chief inspectors have been held and a code of rules and instruction for the inspection and testing of locomotives propelled by other than steam power has been prepared and agreed to by all parties:

It is ordered, That rules and instructions for the inspection and testing of locomotives propelled by other than steam power, as follows, numbered consecutively from 200 to 261, inclusive, and 300 to 337, inclusive, together with cuts, tables, drawings, and forms numbered 1-A, 1-B, 2-A, 4-A, 4-B, 19-A, and 19-B, be, and the same are hereby, approved, and from and after the first day of July, 1926, except as otherwise specified, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as minimum requirements: *Provided*, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and

instructions not inconsistent with the foregoing tending to a greater degree of precaution against accidents.

By the commission.

GEORGE B. MCGINTY,
Secretary.

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3 **Excerpts from Defendant's Exhibit 20**

James O. Tolbert

being first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Mackall:

Q. State your name, please. A. My name is James O. Tolbert.

Q. Where are you employed, Mr. Tolbert? A. I am employed in the Bureau of Safety and Service of the Interstate Commerce Commission.

Q. How long have you been employed in the Interstate Commerce Commission? A. Since March 10, 1908.

Q. What are the functions of the Safety Bureau?

* * * * * * * * * *

A. Well, it is to administer the Safety Appliance Acts and the Hours and Service Acts, and what we call the Signal Inspection Bureau. The Safety Applicance Acts are the acts that require automatic couplers, hand brakes, air brakes, and so forth, on railroad rolling stock; that is, engines, tenders, cars and trains.

Q. In what capacity are you employed? A. I am em-
ployed as a trial attorney in the enforcement of
4 these acts just mentioned.

Q. What are your duties, briefly, as a trial attorney for the Bureau of Safety? A. Well, on a safety appliance case, when the case is once set for trial, I proceed to the place of trial and work with the United States

Attorney. In most instances he turns the case over to me completely and I get the case ready for trial by interviewing the witnesses and conduct the trial to its conclusion.

Q. The case is normally brought by the Department of Justice, isn't it, though? A. In the name of the Department of Justice upon information furnished by the Interstate Commerce Commission.

Q. Do you have any function in deciding whether prosecution shall be brought? A. Very much so. In the first place, the evidence of these violations is submitted to the Commission by our field inspectors, and they come to me for a review to determine whether or not I think the acts apply, and if they do, whether they have been violated, and the cases are summarized. Before they go to anybody else for approval, I sign the recommendation sheet whether to prosecute or not to prosecute.

Q. What function does the Interstate Commerce Commission have with respect to the Safety Appliance Act? A. Well, of course, the Interstate Commerce Commission has been designated by law to administer the law, and under what we call the 1910 act the Commission was given a duty to specify the number, the dimensions, and the location and manner of application of these various appliances provided for by the act, the purpose of that being that these appliances would be at the same place and of the same dimensions on every car in the country.

Q. How are these standards published by the Commission? A. Well, the Commission issued its order of March 13, 1911, which we call the Safety Appliance Standards. They have been amended to a very small degree, and I think in a few years later, to provide for the use of metal running boards in addition to the wooden running boards, and, of course, that order is published in the Federal Register and I suppose every railroad in the country has copies of it.

Q. How was this order arrived at originally or in the course of its amendment? A. It was a rather long drawn-

out procedure. The representatives of the Interstate Commerce Commission, who were employees of the Bureau of Safety—they, of course, had been in charge of this law for a number of years, and they drew up what I would call a tentative order. They went out in the field and in the yards and watched these appliances being used, and they were very careful to specify what they considered the proper dimensions, but anyway, they prepared a tentative order.

Then this order was sent to the various railroads and to the various representatives of the train service, train and engine service employees of the railroads for their comments, and then they all got together and they had several conferences, and then they ironed out everything that was possible to be ironed out. Then the matter was set for hearing before the full Commission, and these various organizations were there at the hearing through the representatives. After some two or three days hearing, the Commission came out with its order of March 13, 1911.

Q. Do you have a copy of that Safety Appliance Standards Order with you? A. Yes, I do. I hope I brought it with me. This is that order. On the outside it says "Interstate Commerce Commission, United States Safety Appliance Standards, Order of the Commission," and it was reprinted in 1946. The original order is the order of March 13, 1911.

Q. Was that order in effect on November 1, 1951? A. It was in effect on that date and still is.

(The aforementioned document was marked Defendant's Exhibit No. 5 for identification.)

By Mr. Mackall:

Q. Mr. Tolbert, what equipment does that order cover, briefly?

* * * * * * * * * * *

7 A. In the order, there are several different headings. The first one is entitled "Box and other House Cars," and they go ahead and specify the different appliances and where they are to be placed.

Q. Would you characterize generally the equipment that order covers?

Mr. Meyer: Objected to, and move to strike out the prior answer.

* * *

The Witness: The order covers what is known in railroad parlance as standard equipment; that is, box cars, flat cars and gondola cars and tank cars, cabooses and locomotives used both in what we call road service and switching service. That is in general terms what it covers.

* * * * * * * * * * *

Q. Does that order cover motor track cars such as are used by maintenance of way departments and four-
8 wheel hand cars, push cars or trucks? A. It does not.

Mr. Meyer: Objected to for the reason stated and move to strike the answer.

* * * * * * * * * * *

Q. Do you have any official document from the Interstate Commerce Commission stating whether this order we are speaking of refers to railroad motor track cars or four-wheel push cars or trucks?

* * * * * * * * * * *

Mr. Meyer: Objected to.

* * * * * * * * * * *

Q. Do you have anything from the Commission such as I have described?

Mr. Meyer: Objected to.

The Witness: Nothing as applied to that type of cars. I do have in my possession a letter that under date of May 5, 1955, was addressed to your firm, enclosing a copy of this order of March 13, 1911, with certain comments,

and that letter is signed by the Secretary of the Commission, Harold D. McCoy.

* * * * * * * * * * *

Mr. Mackall: May I ask the reporter to mark that as Defendant's Exhibit 6 for identification?

(The document above referred to was marked Defendant's Exhibit No. 6 for identification.)

* * * * * * * * * * *

9 Q. Mr. Tolbert, will you read that last two paragraphs in that letter, please?

Mr. Meyer: Objected to.

The Witness: "A copy of that order is attached from which you will note that the Commission carried out this mandate as to box and other house cars, hopper cars, gondola cars, flat cars, tank cars, caboose cars, passenger train cars, locomotives and cars of special construction.

"No specifications were issued for any other types of cars."

* * * * * * * * * * *

Q. How does the Interstate Commerce Commission keep track of railroad equipment? A. Through a force of fifty-seven field inspectors, all of them experienced railroad men.

Q. How do they operate? A. Well, they go around from within their designated territory from railroad yard to another and go out in the yard and inspect this equipment, and after the inspection is concluded they make a report to us as to what they find.

Q. What is that report called? A. That is called their regular inspection report.

Q. Go ahead. I didn't mean to interrupt you.

10 A. Then at the end of the month these reports are assembled according to railroads and a copy of them are transmitted to the president or other responsible officer of the railroad for such action as is necessary.

Q. Do you keep informed concerning the contents of regular inspection reports? A. Oh, yes.

Q. Do these regular inspection reports ever mention the type of equipment involved in this case; namely, motor track cars and push cars?

Mr. Meyer: That is objected to for the reasons stated.

The Witness: They do not.

* * * * * * * * * *

Q. What is a violation report? A. Well, that is when any of this equipment, this standard equipment is not equipped in accordance with the Safety Appliance Acts, or that equipment on there is out of repair and if the car or equipment is moved in that condition that constitutes a violation of the Safety Appliance Acts.

Q. Do you keep informed concerning the contents of violation reports? A. I do, because I think I see every one of them that comes in.

11 Q. Do these violation reports ever mention the type of equipment involved in this case?

Mr. Meyer: Objected to.

The Witness: They do not.

* * * * * * * * * *

Q. If an employee operating the type of equipment involved in this case were concerned about its safety, how could he bring his concern to the attention of the Commission?

Mr. Meyer: Objected to.

The Witness: Well, I think the thing to do, like anybody else does, is just to sit down and write the Commission a letter.

* * * * * * * * * *

Q. Does the Commission receive such letters concerning standard railroad equipment? A. Not to my knowledge, and I think if they did it would come over my desk.

Q. I am speaking of standard railroad equipment? A. Oh, yes, we get letters constantly, and in fact, that is where we get a good many of our tip-offs that the law is being violated.

Q. Now, has your Bureau ever received any letters complaining about the safety of the type of equipment
12 involved in this case?

Mr. Meyer: Objected to.

The Witness: Not to my knowledge. I think I would know it if it came in.

* * * * * * * * * *

Q. Generally what equipment is a car subject to the Safety Appliance Act required to have?

* * * * * * * * * *

13 Q. How about automatic couplers? A. Well, in all of the cars, no matter what type they are, they are required to have automatic couplers.

Q. And generally how would you describe an auto-
14 matic coupler? A. That can be defined, I think, very largely by using the language of the Act. It is a coupler that will couple automatically by impact. That is, when they come together and they hit, there is a little pin on each coupler that when they hit, it drops down behind what we call the lock block and the coupling is made.

Q. And those couplers are constructed of steel? A. Well, they are molded. I think you would call it malleable steel.

Q. Approximately what does an automatic coupler weigh? A. Of course, I wouldn't be competent except to make a more or less guess, but from the looks of them, they would weigh from one hundred to two hundred pounds each. Of course, on a locomotive, they are even larger. I had a case down in New Orleans where we had one as an exhibit, and it was so heavy a man couldn't lift it. I suppose it would weigh about four hundred pounds on the locomotive.

* * * * * * * * * *

15 Q. Has your Bureau been concerned in the equipment on four wheel track cars and four-wheel hand cars or push cars since you have been there?

Mr. Meyer: Objected to for the reasons stated.

The Witness: They have not.

* * * * * * * * * * *

Mr. Meyer: I formally move to strike all of the testimony of the witness as being irrelevant to the issues in this case. I am reserving that right.

* * * * * * * * * * *

16 Q. Is it not a fact that despite the interpretation that the Commission has given to the Safety Appliance Act the courts have interpreted those acts differently at times?

* * * * * * * * * * *

The Witness: In answering that question, I would say that the Circuit Court of Appeals for the Second Circuit in the so-called Hoffman case did that very thing.

* * * * * * * * * * *

17 By Mr. Mackall:

Q. Has the Commision followed the court's ruling in the Hoffman case?

Mr. Meyer: I object to that.

The Witness: They have not.

* * * * * * * * * * *

Defendant's Exhibit 6

INTERSTATE COMMERCE COMMISSION
OFFICE OF THE SECRETARY
Washington 25

May 5, 1955

Steptoe & Johnson
Local Counsel
Shoreham Building
Washington, D. C.

Gentlemen:

We have your letter of May 2, 1955, concerning the proviso contained in 45 U.S.C. 6, reading as follows:

> That nothing in this chapter contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

In your letter you request a statement from this Commission concerning any action it has taken to apply this provision of law to four-wheel motor cars and four-wheel hand cars used on railroads.

The original Safety Appliance Act, approved March 2, 1893, required power brakes, automatic couplers and handholds or grab irons on railroad cars and locomotives. Its purpose was primarily to protect railroad employees from the hazards of coupling and uncoupling railroad cars, and dangers incident to going on tops of cars for the purpose of setting hand brakes.

On April 1, 1896, the amendment contained in the proviso heretofore quoted was approved to exclude four-wheel cars in the manner stated in the proviso.

The Act of April 14, 1910, authorized the Commission to designate the number, dimensions, location, and manner of application of the appliances named in what are now sections 4 and 11 of the present code. This provision of law is now contained in section 12 of the code.

By its order of March 13, 1911, the Commision carried out the requirements of what is now section 12 by issuing its order fixing the number, dimensions, location, and manner of application of safety appliances on railroad rolling stock.

A copy of that order is attached from which you will note that the Commission carried out this mandate as to Box and other house cars, Hopper cars, Gondola cars, Flat cars, Tank cars, Caboose cars, Passenger train cars, locomotives, and cars of special construction.

No specifications were issued for any other types of cars.

Respectfully,

HAROLD DARCLEY
Secretary

Defendant's Exhibit 16, 16a, 17

WASHINGTON GROVE

[fol. 96] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT

v.

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. Laidler B. Mackall, with whom *Mr. George B. Mickum, III,* was on the brief, for appellant.

Mr. Milford J. Meyer, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of Court, with whom *Mr. Irving L. Chasen* was on the brief, for appellee. *Mr. Irving A. Levine* also entered an appearance for appellee.

OPINION—Decided June 7, 1956

Before PRETTYMAN, DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* A jury verdict was rendered in favor of appellee in an action under the Federal Employers' Liability Act [1] for damages for personal injuries sustained in the course of his employment with The Baltimore and Ohio Railroad Company.

Appellee was injured in the derailment of a four-wheel [fol. 97] motor track car which was then towing a four-wheel push truck along railroad tracks. The push truck weighed about 800 pounds empty and with the tools it was then carrying weighed about 1,200 pounds. There was no brake or motive power on the push truck. The motor track car was slightly heavier than the empty push truck and was equipped with a hand brake. While passing through a railroad station, the car struck a large dog; the impact derailed the car and appellee was thrown into a ditch and injured.

Appellee brought suit against the railroad under the Federal Employers' Liability Act, *supra,* alleging two

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[1] 35 STAT. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

causes of action. The first cause of action was based on the negligence of appellant in directing appellee to operate a motor track car and push truck without sufficient braking power, and in requiring appellee to pull the push truck over wet, slippery rails when the truck was not equipped with brakes. The second cause of action alleged that appellee's injuries were proximately caused by appellant's violations of the Safety Appliance Act [2] and the Boiler Inspection Act [3]—specifically, in that (a) the motor car was not equipped with a power driving-wheel brake (air brake), (b) the push truck was not equipped with any brakes, and (c) appellant had directed appellee to operate a car and truck without sufficient braking power.

The court below ruled and charged the jury that the provisions of the Safety Appliance Act were applicable to the vehicles in question. The issues on both causes of action were submitted to the jury, which found in favor [fol. 98] of the appellee on "the issues aforesaid." This appeal is directed only to that part of the judgment which was based on the second cause of action.[4] Appellant contends: (1) the vehicles in question were not subject to the Safety Appliance Act and (2) appellee did not make a sufficient showing to go to the jury on the issue of whether the absence of the appliances allegedly required by the Safety Appliance Act was a proximate cause of the accident.

With respect to the first issue, appellant argues that the vehicles in question are exempt from the requirements of the Safety Appliance Act because of the proviso of § 6:[5]

> *Provided*, That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or

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[2] 27 STAT. 531 (1893), 32 STAT. 943 (1903), 36 STAT. 298 (1910), 45 U.S.C. §§ 1-16 (1952).

[3] 36 STAT. 913 (1911), 38 STAT. 1192 (1915), 43 STAT. 659 (1924), 45 U.S.C. § 23 (1952).

[4] Since the jury's determination does not reveal whether they found for plaintiff on both or simply one cause, error found on this appeal would call for a new trial, without any appeal as to the first cause of action.

[5] 27 STAT. 532 (1893), 29 STAT. 85 (1896), 62 STAT. 909 (1948), 45 U.S.C. § 6 (1952).

> to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Both vehicles involved *were* four-wheel cars, one powered and braked, one with neither power nor brakes.

Appellee contends the exemption in § 6 refers only to *logging cars*, and in support of this argument cites the decisions in *Spokane & Inland Empire R.R.* v. *United States*, 241 U.S. 344 (1916); *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F.2d 227 (2d Cir. 1934), cert. denied, 294 U.S. 715 (1935); *Martin* v. *Johnston*, 79 So.2d 419, cert. denied, 350 U.S. 835 (1955). Appellant, however, correctly points to the fact that the statute as originally enacted simply said [fol. 99] "*Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains." 27 STAT. 532 (1893). The legislative history (discussed *infra*) shows that this provision was directed in its enactment specifically to exempt *coal cars*. 24 CONG. REC. 1477 (1893). Subsequently, in 1896, the proviso was amended to include "eight-wheel standard logging cars." 29 STAT. 85 (1896). The legislative history indicates that the proviso was amended because standard logging cars were only eight-wheeled. H.R. REP. No. 727, 54th Cong., 1st Sess. (1896).

The cases cited by appellee on this point are not helpful. In *Hoffman* v. *New York, N.H. & H.R. Co.*, *supra*, the court merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains. In *Spokane & Inland Empire R.R.* v. *United States*, *supra*,[8] the Supreme Court referred to the § 6 exemption, again without discussion, as if it covered only logging trains.[8] In *Martin* v. *Johnston*, *supra*, the court made no reference whatsoever to the applicabiltiy of § 6.

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[8] This case was concerned only with the street railway train exemption of § 8, 32 STAT. 943 (1903), 45 U.S.C. § 8 (1952).

Although we do not believe the four-wheel car exemption in § 6 can be interpreted to apply solely to logging cars,[7] we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be restricted to coal cars. The four-wheel car exemption was enacted in 1893 as part of the original Safety Appliance Act. The exemption was offered as an amendment to the original bill (H.R. 9350). The Senator offering the amendment stated:

> MR. BLODGETT. I desire to offer an amendment. At the end of section 6 of the bill as reprinted I move to add the following proviso:
>
> [fol. 100] *Provided,* That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.
>
> The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from New Jersey [MR. BLODGETT] to the amendment of the committee.
>
> MR. BLODGETT. Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used, because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that peculiar work. A hook arrangement and link are used with considerable lost motion between the cars.
>
> It is necessary to use that appliance, as I said, in order to go around the sharp curves. *I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic, and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction*

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[7] United States v. St. Louis-San Francisco Ry., No. 5522, District Court for the Eastern Division of Mo., May 11, 1922 (unreported).

points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.

MR. CULLOM. I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

MR. STOCKBRIDGE. Let the amendment be read.

The Secretary read MR. BLODGETT's amendment to the amendment of the committee.

MR. STOCKBRIDGE. That is all right.

The amendment to the amendment was agreed to. [Italics supplied.] (24 CONG. REC. 1477 (1893).)

[fol. 181] We do not believe we can ignore such a clear and compelling statement as to the intent of the proviso.[8] To hold otherwise would require us to say that a railroad could run entire trains of four-wheel maintenance and supply cars drawn by a powered tractor, also having four wheels, and disregard the admitted fact (J.A. 69-70) that unbraked vehicles behind the powered tractor extend the distance required to stop the train, thus exposing employees to substantially increased hazards.

Our conclusion is further reinforced by the fact that if the four-wheel car exemption is interpreted to cover all

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[8] As the Supreme Court said in United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940), "Frequently, however, even when the plain meaning [of a statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

four-wheel cars, this means a four-wheel motor track car like the one appellee was driving need not even be equipped with hand brakes as required by § 11 [9] of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h. We do not believe Congress intended [fol. 102] such a result when it provided in § 11 that "all cars must be equipped with . . . efficient hand brakes." 36 STAT. 298 (1910), 45 U.S.C. § 11 (1952). The long-established command to interpret this act liberally to accomplish its declared objective, the safety of persons and trains,[10] no doubt guided the trial court, and we think correctly so.

We are aware that when the logging-car exemption was added in 1896 the House Report [11] stated, in referring to the original four-wheel exemption:

> In the original act of March 2, 1893, there is a provision at the end of section 6 which exempts trains composed of four-wheeled cars from the operations of the act. This was evidently intended to applying to logging trains, but it happens that the cars are of eight wheels and do not come within the exception.

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[9] Although the § 6 exemption is not referred to in § 11 of the act, § 16 provides:

> § 16. Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts." The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title. (36 STAT. 298 (1910), 45 U.S.C. § 16 (1952).)

Since a four-wheel car is exempt from §§ 1-10 of the act, it would seem to be exempt from § 11.

[10] Lilly v. Grand Trunk Western R.R., 317 U.S. 481, 486 (1943); Brady v. Terminal R.R. Ass'n, 303 U.S. 10, 15 (1938); New York Central R.R. v. United States, 265 U.S. 41, 44-45 (1924).

[11] H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

Obviously, the draftsman of this 1896 report failed to read the 1893 legislative history for there is no support for the House Report's conclusion and we must view the statement in the 1896 House Report as one Congress' erroneous *post* legislative view of the intent of a prior Congress.

Appellant also argues that the motor track car in question is not covered by the act's §1 [12] requirement for air [fol. 103] brakes and a train brakes system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.

We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a "locomotive" only if it is actually used to haul standard railroad cars. In *United States* v. *Fort Worth & Denver City Ry. Co.*, 21 F.Supp 916 (N.D. Tex. 1937), the court held that a locomotive crane which was used to haul three other cars was a locomotive within the meaning of §1 of the Safety Appliance Act. The court stated at p. 918:

> . . . In other words, while the equipment is being used as a crane, and moved about at the scene of construction, it is still a crane and does not become a locomotive, but where, as here, it is used to haul cars for a distance up to two and one-half miles from a switch to the scene of construction, it is being used for the purposes for which a locomotive is used and is a locomotive within the meaning of the statute. While the equipment is being used as a locomotive, it is a locomotive, regardless of whatever else it might also be.

The court in *Hoffman* v. *New York, N.H. & H.R.Co.*, *supra*, held that a gasoline tractor which was hauling a hand

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[12] This section provides in pertinent part:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . . (27 STAT. 531 (1893), 45 U.S.C. §1 (1952).)

car, was a locomotive within the meaning of 45 U.S.C. §§ 1, 2.[13]

The I.C.C. order of December 14, 1925,[14] providing

> [fol. 104] A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.
>
> A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive.

is a classification which cannot control the courts in this situation. That definition is for purposes other than those we must deal with here. Since the motor track car in the instant case was being used to move other equipment, the I.C.C. order does not preclude a conclusion, on the facts of this case, that the car was then a locomotive even though it was not designed *solely* for moving other equipment.

In the present case the motor track car was being used to haul another car, i.e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name.

Appellant's second contention is that appellee failed to carry the burden of proving that the absence of the type of brakes allegedly required by the Safety Appliance Act was a proximate cause of the accident.

Appellee testified that if he had been driving the motor car alone without the truck, he could have stopped in about six to eight feet. Mr. Chrissinger, the Railroad's brake expert, testified that if the existing brakes lock[15] the wheels, the efficiency of the brakes would not be increased by increasing the brake power. Since this testimony was un-

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[13] We do not believe the court based its decision solely on the fact that the "gasoline engine was frequently used to haul a long line of cars" (74 F.2d at 232).

[14] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

[15] Appellee had testified that the brakes did lock the wheels of the motor car.

contradicted, it is suggested that air brakes would not have helped in any way to prevent the accident. However, this expert, on cross-examination, conceded that any unbraked portion of equipment behind the motored unit adds to the stopping distance of the entire train. Thus, the jury might reasonably find from the testimony that although air brakes on the motor car would not have been more efficient than the present brakes, the train, consisting of the motor car and push truck, would have stopped sooner if the push truck had been equipped with brakes controlled from the motor car (a train brake system)—i.e., that appellee either could have stopped before hitting the dog or could have slowed down sufficiently so that the impact would not have derailed the car.[16]

Affirmed.

[fols. 106-108] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT—April Term, 1956

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

v.

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court for the District of Columbia. Before: Prettyman, Danaher and Burger, Circuit Judges.

JUDGMENT—June 7, 1956

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

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[16] It is sufficient under the Federal Employers' Liability Act that the injury result *in part* from defendant's negligence. 35 STAT. 65 (1908), 45 U.S.C. § 51 (1952); Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956); Coray v. Southern Pacific Co., 335 U.S. 520, 524 (1949).

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal and have execution therefor.

Dated: June 7, 1956.

Per Circuit Judge Burger.

[fol. 109] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 110] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

DANIEL T. JACKSON

ORDER ALLOWING CERTIORARI—Filed November 5, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duty certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U.S.
FILED
AUG 3 1 1956
JOHN T. FEY, Clerk

No. 370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.

STEPTOE & JOHNSON
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	10
Conclusion	17
Appendix	
Text of Statutes Involved	1
Opinion Below	3
Judgment Below	13
District Court Order	14
District Court Memorandum	14
Defendant's Exhibit No. 11	17

CASES:

Davis v. *Manry*, 266 U.S. 401	14
Hoffman v. *New York, N.H. & H.R. Co.*, 74 F. 2d 227, cert. denied 294 U.S. 715	8, 9, 10, 11, 12, 17
Jacobson v. *New York, N.H. & H.R. Co.*, 206 F. 2d 153	7
Louisville & N.R. Co. v. *United States*, 282 U.S. 740	15
Patterson v. *Lamb*, 329 U.S. 539	16
Shields v. *Atlantic Coast Line*, 350 U.S. 318	13
Spokane & I.E.R. Co. v. *United States*, 241 U.S. 344	12
United States v. *St. Louis-San Francisco Ry.*, No. 5522, U.S. Dist. Ct. D. Mo.) 1922	11
Wisconsin v. *Illinois*, 278 U.S. 399	14-15

STATUTES:

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*	7, 17
Safety Appliance Act, 45 U.S.C. § 1, *et seq:*	
45 U.S.C. § 6	2, 3, 9, 10, 11, 12, 15
45 U.S.C. § 8	12

MISCELLANEOUS:

	Page
Car Builder's Cyclopedia, 18th Ed., 1949-1951	13
I.C.C. Other-Than-Steam Locomotives Order, December 14, 1925	6, 14
I.C.C. Safety Appliance Standards Order, March 11, 1913	7, 13
Locomotive Cyclopedia, 13th Ed., 1947	13
Revised Rules Supreme Court of the United States, Rule 19(1)(b)	10
Vinson, C.J., Address Before American Bar Association, September 7, 1949	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto (App. 3). It is reported at 233 F. 2d 660. There was no opinion in the District Court. The order of the District Court denying defendant's motion to strike that part of the complaint

which alleged violations of the Safety Appliance Act (App. 14), and the memorandum filed by the District Court on rehearing of defendant's motion (App. 14-15) are also printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956 (App. 13). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The provisions requiring the use of specific safety appliances on railroad equipment are contained in sections 1-7 of the Safety Appliance Act, 45 U.S.C. § 1 *et seq.* Section 6 of the Act provides in part:

> ". . . That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars, . . . or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."[1]

In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks?

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[1] The words "nothing in sections 1-7 of this title" were substituted in the codification of § 6. As enacted by Congress, 27 Stat. 532, March 2, 1893, and in its only subsequent amendment, 29 Stat. 85, April 1, 1896, this language read: "nothing in this Act contained shall apply to trains composed of four-wheel cars . . ."

STATUTES INVOLVED

The full text of Section 6 and Sections 1, 8, 11 and 23 of the Safety Appliance Act, the sections referred to in respondent's complaint, is printed on the Appendix to this petition.

Of critical importance is the following quoted part of § 6 of the Act, 45 U.S.C. § 6:

> "*Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

STATEMENT

This case presents the single important question whether or not the Safety Appliance Act applies to the four-wheel motor track cars and push trucks. There are more than 60,000 motor track cars and many more push trucks in use on American railroads today. None of these vehicles is equipped with air brakes, automatic couplers, standard draw bars, approved sill steps, ladders, whistles, bells and other devices required by the Safety Appliance Act. It is physically impossible to equip motor track cars and push trucks with all of these devices. So equipped, they would be too heavy to be removed from the tracks by a few men and, hence, would be unusable. However, if the Act applies, they are required to carry all these devices, most of which are not even remotely appropriate to their use.

During the sixty-three years the Safety Appliance Act has been in effect, the Interstate Commerce Commission, the agency charged with enforcement of the Act, has never applied the Act to vehicles of the type involved here. The Court of Appeals decision in this case holding the Act applicable, is in direct conflict with the long-established and uniform Interstate Commerce Commission interpretation and with the holding of another circuit. It is an unwarranted and unprecedented extension of the Act which will profoundly affect federal administration of the statute itself as well as the operations of the entire railroad industry.

The facts of the case are simple. Respondent, a section foreman of 46 years experience, was operating a motor track car along the westbound tracks of petitioner at Washington Grove, Maryland, on the afternoon of November 1, 1951. The day was misty and a light rain was falling which made the tracks wet and slippery (R. 26).[2] The motor track car was towing a push truck and carrying a load of tools and two men in addition to respondent (R. 24-25). As it was passing through Washington Grove Station, a dog suddenly dashed in front of the motor track car. The car struck the dog and was derailed (R. 27), injuring respondent.

The Vehicles Involved

A motor track car with men aboard and a push truck attached is illustrated in the Appendix to this petition (App. 17). As the photograph shows, this car

[2] Nine copies of the Joint Appendix before the Court of Appeals have been submitted to this Court with the Petition. References to the Joint Appendix are designated "R." and references to the Appendix to this petition, "App.".

is a lightweight, four-wheel vehicle, powered by a small gasoline motor. It is the successor to the familiar hand car of an earlier day. It travels along the tracks on wheels driven by a belt from the motor, in a manner similar to the operation of a power lawn mower. Riders sit on a bench running the length of the car with their feet on running boards. Tools and other equipment can be carried beneath the bench. The driver sits on the left rear side of the car and controls it by operating two levers which extend above the center of the bench. The car is braked by simple mechanical brakes which the driver applies by pulling back on the lever, thereby causing a brake shoe to be forced against each of the four wheels.

The record shows that there are approximately 60,000 motor track cars currently in use on American railroads, all substantially similar to the car involved here (R. 78). None is equipped with devices required on locomotives by the Safety Appliance Act. Motor track cars must be light enough to be lifted from the tracks by not more than three men after arriving at their place of work on the road bed in order not to interfere with the passage of regular trains (R. 42).

The push truck involved in this case is also a standard item of railroad equipment, and there are thousands of these trucks in use today. The push truck consists simply of a flat wooden platform mounted on four flanged wheels. It may be pushed or pulled along the track by hand or by a motor car. Push trucks do not have brakes. They neither move nor stop by their own power (R. 78). Respondent himself testified that he had never seen a push truck with brakes (R. 41).

The motor track car involved in this case was assigned to the respondent and he was not supposed to use it unless its brakes were in good condition (R. 39). Respondent testified that prior to using the car on the day of the accident he tested the brakes and they were in good condition (R. 43). In addition, he testified that the brakes worked properly at the time of the accident and locked the wheels when he pulled back on the brake lever (R. 55). Accordingly, the condition of the brakes was not an issue in this case.

Administration of the Safety Appliance Act

The Interstate Commerce Commission has been designated by law to administer the Safety Appliance Act (R. 85). Violations of the Act are prosecuted by the Department of Justice upon information furnished by the Commission (R. 85). The Commission has never construed the Act as applicable motor track cars and push trucks (R. 90-91). At the trial it was stipulated by counsel that the Department of Justice had never prosecuted a violation of the Safety Appliance Act which involved either motor track cars or push trucks (R. 73).

In addition, the record contains a copy of an Order of the Interstate Commerce Commission, in effect on the date of the accident, which states that motor track cars are not to be considered "locomotives" within the meaning of the Act. (R. 83). In the words of the Order:

> "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive. . ."

Witnesses from the Commission testified that although this agency was charged with the enforcement

of the Act, the Commission did not inspect, issue any regulations, or take any action with respect to railroad motor track cars or push trucks (R. 81, 87, 88, 89, 90, 91); that the Locomotive Inspection Service which is required to inspect all locomotives at regular intervals took no cognizance of motor track cars (R. 80, 81); and the Commission's Safety Appliance Standards Order, establishing specifications for the equipment required by the Act or deemed necessary by the Commission, did not apply to motor track cars and push trucks (R. 87, 88).

Proceedings in the District Court

Respondent brought an action under the Federal Employers' Liability Act in the United States District Court for the District of Columbia. He alleged two causes of action:

The first, sounding in negligence, claimed that the railroad was negligent in furnishing him with a motor track car and push truck "without sufficient braking power" and requiring the motor car to pull the push truck over wet and slippery rails when the push truck was not equipped with brakes.

The second, alleging violation of the Safety Appliance Act, claimed that because there were no air brakes on the motor track car and no brakes of any kind on the truck, petitioner had violated those provisions of the Safety Appliance Act which required air brakes on "locomotives" and brakes on all cars subject to the Act.[3]

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[3] Speaking generally, in an action under the Federal Employers' Liability Act, violation of the Safety Appliance Act is, in effect, negligence *per se* and if such "negligence" is a proximate cause of the employee's injury, the railroad is liable under the Federal Employers' Liability Act. *Jacobson* v. *New York, N. H. & H. R. Co.*, 206 F. 2d 153.

Petitioner's motion to strike that part of the complaint which alleged violations of the Safety Appliance Act was denied by the District Court (App. 14). On re-hearing of this motion, the court stated that it was "not at all insensible to the practical argument advanced for the non-inclusion of the type of vehicle involved here under the Safty Appliance Act," but since there was "authority of respectable character which supports the position already taken," that the exemption applied only to logging cars, the court held the Act applicable. Since the court thought that Section 6 of the Safety Appliance Act was "unambiguous," reference to the legislative history was precluded (App. 14-15).

After trial in the District Court and an instruction that the Safety Appliance Act applied, respondent recovered a judgment for $15,000. This judgment was reviewed on appeal.

Opinion of the Court of Appeals

The appellate court plainly did not agree that Section 6 was unambiguous on the question whether the types of vehicles involved here were exempt from the Act. Its opinion relies almost entirely on its own interpretation of the legislative history of that section. It rejected alike the Commission's interpretation that all four-wheel cars are exempt and the opinion of the Court of Appeals for the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d, 227, cert. denied 294 U.S. 715, that the exemption applied only to "logging cars." In an entirely original approach, it held that the four-wheel car exemption was restricted solely to "coal cars" which are nowhere mentione in the Act. On that basis, it affirmed the judgment of the District Court.

This view of the Court of Appeals is without precedent in any known case. The plain wording of Section 6, which exempts *all* four-wheel vehicles from the Safety Appliance Act, was avoided by the following curious reasoning: If, said the Court, all four-wheel vehicles were exempt, a railroad could run entire trains of unbraked push trucks behind motor track cars and disregard the fact that unbraked vehicles increase train stopping distances, thus exposing employees to increased hazards. Since the Court deemed such a practice to be at variance with the policy of the legislation as a whole, it ignored the plain language exempting all four-wheel cars. Thus, by reference to a purely theoretical practice—unsupported by the record and unknown in actual operations—the present anomalous result was reached.

The opinion is in direct conflict with the opinion of the Court of Appeals for the Second Circuit in the *Hoffman* case, *supra*. It negates the long-established administration of the Act by the Interstate Commerce Commission and the Department of Justice. It presents grave and serious problems in the administration of the Act, since, as matters now stand, neither the Interstate Commerce Commission, nor the railroad industry can know which of these conflicting interpretations of the Act should be followed.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Is in Direct and Irreconcilable Conflict With the Decision of the Court of Appeals for the Second Circuit in Hoffman v. New York, New Haven and Hartford R. Co., 74 F. 2d 227, cert. denied 294 U. S. 715

The decision of the court below on the interpretation to be given to Section 6 of the Safety Appliance Act cannot possibly be reconciled with the decision of the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.* While the net results in these two cases are not disparate, the conflict on this important question of federal law is direct. It is precisely the type of conflict which this Court recognizes under its Rule 19(1)(b) pursuant to its purpose "to secure the national rights and uniformity of Judgmts."[4]

The *Hoffman* case concerned an accident arising out of the towing of a hand car by a "gasoline tractor." The court affirmed a recovery based on a violation of the Safety Appliance Act after determining that the tractor was a "locomotive" because it "was frequently used to haul a long line of cars [standard railway cars], and there was as much reason for its being equipped to control their movements, as though it had been a steam locomotive employed for a similar purpose." 74 F. 2d, at 232. It might be added that the court additionally found "proof of defective brakes, a coupling device that was a mere dangerous makeshift, [and] an excessive rate of speed in moving the defectively equipped car." *Ibid.* The significance of

[4] Address of the late Chief Justice Vinson before the American Bar Association, September 7, 1949, quoting from Statement of John Rutledge of South Carolina during debates before the Constitutional Convention.

the *Hoffman* case, however, is that the argument was made there that the equipment involved was exempted from the Act by Section 6. The court rejected this contention relying *entirely* on its conclusion that: "The *exceptions* in section 6 are *expressly limited to 'logging' trains.*" *Ibid.* [Italics added.]

In the case at bar the Court of Appeals for the District of Columbia Circuit recognized this holding but characterized it as "not helpful" because the Second Circuit had "merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains." 233 F. 2d, at 662. But the court went on to state:

> "Although we do not believe the four wheel car exemption in § 6 *can* be interpreted to apply solely to logging cars*, we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be *restricted to coal cars.*" 233 F. 2d, at 662. [Italics added.]

In the *Hoffman* case, as here, only four-wheel cars were involved. Since both circuits were concerned only wth the four-wheel car exception, it follows that the holdings of the Second Circuit in *Hoffman* and the District of Columbia Circuit in *Jackson* are mutually exclusive and in direct conflict. If the four-wheel car exemption is "expressly limited to 'logging'

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* At this point the court cited *United States* v. *St. Louis-San Francisco Ry.*, No. 5522, United States District Court for the Eastern Division of Missouri, May 11, 1922, (unreported). The opinion in this case, which includes an extensive discusson of the legislative history of the original § 6 and its amendment, is reprinted at pages 8-13 of the Record. It directly supports the position of petitioner that the 1893 Act exempted *all* four wheel cars and the 1896 amendment merely enlarged the exemption to include eight-wheel logging cars.

trains," *Hoffman, supra,* it cannot be "restricted to coal cars," *Jackson, supra.*

It is also clear that this direct conflict on a critical provision of the Safety Appliance Act is of the gravest consequence. The Interstate Commerce Commission which must enforce the Act, the thousands of workmen who use the vehicles involved, the railroads that maintain them, and the courts determining cases arising out of accidents resulting from their use, must await alike the authoritative determination of this Court.[5]

II.

The Decision Below Overturns Sixty-Three Years of Consistent Administration of the Act by the Interstate Commerce Commission Despite Refusal of Congress to Alter the Commission's Interpretation in Repeated Amendments and Additions to the Act

The Safety Appliance Act was enacted on March 2, 1893, 27 Stat. 531. Section 6 of the Act was amended to its present form on April 1, 1896, 29 Stat. 85. In addition to providing for exemptions from the Act, Section 6 provides that it shall be the duty of the United States Attorneys to bring suits for violation of the Act on information furnished by the Interstate Commerce Commission, 45 U.S.C. § 6.

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[5] It could be argued, perhaps that the present case conflicts with a dictum of this Court in *Spokane & I.E.R. Co.* v. *United States,* 241 U.S. 344, 350, which referred to § 6 as "the provision excepting cars used on logging railroads". The better view, however, would seem to be to recognize this as a dictum included in a case which concerned the street railway exemption, of § 8, 45 U.S.C. § 8. As such, while it casts doubt on the interpretation of the court below, it does not bear directly the critical issue presented in this case.

The Interstate Commerce Commission has, by law, administered the Safety Appliance Act since its inception. This administration is accomplished through the Bureau of Safety and Service of the Commission. Throughout the 63 years of its administration of the Act the Commission has never ruled that motor track cars and push trucks were subject to the Act and the Bureau has taken no cognizance of these vehicles.

On March 11, 1913, the Commission published its Safety Appliance Standards Order which specifies the number, the dimensions and the location of safety appliances required by the Act. This order was reprinted in 1946.[6] It is still in effect today, and it was in effect on the date of the accident. Nowhere in this Order are motor track cars or push trucks mentioned and the Commission has never prescribed standards for these vehicles.[7]

The decision of the Court of Appeals in this case was premised on its holding that the motor track car was a "locomotive" because it was used to pull the

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[6] 49 C.F.R. §§ 131-136.

[7] It is not surprising that these small four-wheel vehicles are not included in the Commission's Order since they are not considered "cars" as that term is usually used to refer to standard rolling stock. There is no description of motor track cars in the Locomotive Cyclopedia, 13th Ed., 1947, and neither motor track cars nor push trucks are described in the exhaustive Car Builder's Cyclopedia, 18th Ed., 1949-51. Authorities, railroads and manufacturers have been unanimous in agreement that Safety Appliance Act devices are not required on the vehicles. This case is entirely different from the problem faced by this Court in *Shields* v. *Atlantic Coast Line*, 350 U.S. 318, where dome running boards were actually provided as standard equipment on tank cars although their specifications had not been standardized by order of the Commission.

push truck. Thus to designate as a "locomotive" a small vehicle that never has been and never could be used to haul standard railroad cars is a strained and unrealistic interpretation, as a glance at a picture of the vehicle itself will show (App. 17). It is likewise an interpretation without precedent in the annals of administration of the Safety Appliance Act.

Not only has the Commission never considered motor track cars to be locomotives, but it has declared by express Order that motor track cars are not to be considered "locomotives." The Commission Order of December 14, 1925,[8] provided for the inspection and testing of locomotives propelled by other-than-steam power. This Order was in effect from the date of issuance through the date of the accident. It states in pertinent part (R. 83):

> "A locomotive is a self-propelled unit of equipment designed *solely* for moving other equipment.
>
> "A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive. . . ." [Italics added.]

This Court has traditionally respected such a "practical construction" by the Commission, *Davis* v. *Manry*, 266 U.S. 401, and it has recognized that "nothing is more convincing in interpretation of a doubtful or ambiguous statute" than such uniform practice of the responsible administrative agency, *Wisconsin* v.

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[8] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other-Than-Steam Power in Accordance with the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924. The Order is reprinted in the Record beginning at p. 81.

Illinois, 278 U.S. 367, 413. In *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740, the administrative construction was not upheld only because this Court found the Statute to be unambiguous. While petitioner here believes that Section 6 clearly exempts *all* four-wheel cars, it must, in fairness, acknowledge that there is a bewildering conflict of opinion in the Federal Courts as to the meaning of this section.

It is significant that nowhere in the Safety Appliance Act or in its legislative history are motor track cars or push trucks mentioned. Yet such equipment, so vital to the maintenance of safe tracks, was in general use almost from the beginning of railroad history and was certainly well known at the time the Act was passed. Congress is clearly aware of the fact that the Commission does not consider the Safety Appliance Act applicable to motor track cars and push trucks, and there has been no attempt by Congress to change this construction in repeated amendments and additions to the Act since 1893. See Acts of March 2, 1903, 32 Stat. 943; May 30, 1908, 35 Stat. 476; April 14, 1910, 36 Stat. 298; June 25, 1948, 62 Stat. 909.

To extend by judicial fiat the jurisdiction of the Commission into an area which—presumably with the approval of the Congress—it had previously not regulated is to multiply the responsibilities of the Commission and create serious new problems of administration and enforcement. Of even greater significance is the fact that boundaries of this new jurisdiction are nowhere defined. They are indicated only by the irreconcilable holdings of the Courts of Appeals in two circuits. Is the Act to apply to all four-wheel cars except coal cars? Is it to apply to all four-wheel cars except those used in logging? Is the Commission to

administer the law by one standard in one circuit and an entirely different and directly conflicting standard in another? Is the Commission to ignore the significance of this decision, or expand its facilities for testing and inspection to a point where they are commensurate with the new responsibility indicated? These are problems that can be solved only by an authoritative pronouncement of this Court.

This Court has properly reviewed cases where a decision was at war with established administrative interpretation. Typical is *Patterson* v. *Lamb,* 329 U.S. 539, where the holding below "upset twenty-five years of important War Department rulings and practices" which would affect thousands of claims. Id., at 541. The same considerations apply with greater force here.

III.

The Court Below Has Decided a Question of Federal Law of Enormous Practical Importance Which Has Not Been, But Should Be, Settled by This Court

There are in active daily use on American railroads more than 60,000 motor track cars and push trucks. These vehicles are necessary for track maintenance work. They are absolutely essential to the railroad industry. If the decision below is accepted literally, every single one of these vehicles will be ruled off the tracks, since none is equipped with appliances required under the Safety Appliance Act. Nor can they be so equipped.

The far-reaching effect of the Court of Appeals decision is appreciated only when this is recognized. The record shows—and it cannot be disputed—that the light weight of these vehicles is essential to their function. They are frequently operated on isolated

sections of track, miles away from the nearest switch. If they cannot be lifted and removed from the track by a few men they are useless. To encumber them with power brakes, automatic couplers, grab irons, standard draw bars, approved sill steps and ladders; in addition, to require the motor track cars to be equipped with headlight, whistle, bell, sander, signal equipment, compressors, and other Safety Appliance Act devices, is manifestly impossible. If it could be done, the motor track car and push truck could no longer serve the essential purpose for which they were designed.

The importance of this question of federal law can scarcely be overstated. The many four-wheel railway maintenance vehicles involved are in constant daily use in every judicial circuit and every state in the Union. They represent an investment of millions of dollars to the railroad industry. The crucial importance of the Safety Appliance Act to any action brought under the Federal Employers' Liability Act means a constant recurrence of the problem presented in this case. Until this Court speaks, the parties, the Commission, and the lower Federal Courts must remain in the welter of confusion induced by the conflicting views already on record.

CONCLUSION

The decision below presents three of the strongest possible reasons for review by this Court.

1. It is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Second Circuit in *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d 227, cert. denied 294 U.S. 715.

2. It overturns sixty-three years of uniform administration of the Safety Appliance Act by the Interstate Commerce Commission and presents grave problems to the Commission's enforcement of the Act.

3. It has decided a question of federal law of enormous practical importance that has not been, but should be, decided by this Court.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

STEPHEN AILES
LAIDLER B. MACKALL
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

APPENDIX

Text of Statutes Involved

45 U.S.C. § 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 27 Stat. 531.

45 U.S.C. § 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

45 U.S.C. § 8. The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. 32 Stat. 943.

45 U.S.C. § 11. It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 36 Stat. 298.

45 U.S.C. § 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said

locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. 36 Stat. 913; 38 Stat. 1192; 43 Stat. 659.

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT

v.

DANIEL T. JACKSON, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 7, 1956

Mr. Laidler B. Mackall, with whom *Mr. George B. Mickum, III,* was on the brief, for appellant.

Mr. Milford J. Meyer, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of Court, with whom *Mr. Irving L. Chasen* was on the brief, for appellee. *Mr. Irving A. Levine* also entered an appearance for appellee.

Before PRETTYMAN, DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* A jury verdict was rendered in favor of appellee in an action under the Federal Employers' Liability Act[1] for damages for personal injuries sustained in the course of his employment with The Baltimore and Ohio Railroad Company.

Appellee was injured in the derailment of a four-wheel motor track car which was then towing a four-wheel push truck along railroad tracks. The push truck weighed about 800 pounds empty and with the tools it was then carrying weighed about 1,200 pounds. There was no brake or motive power on the push truck. The motor track car was slightly heavier than the empty push truck and was equipped with a hand brake. While passing through a railroad station, the car struck a large dog; the impact derailed the car and appellee was thrown into a ditch and injured.

Appellee brought suit against the railroad under the Federal Employers' Liability Act, *supra*, alleging two causes of action. The first cause of action was based on the negligence of appellant in directing appellee to operate a motor track car and push truck without sufficient braking power, and in requiring appellee to pull the push truck over wet, slippery rails when the truck was not equipped with brakes. The second cause of action alleged that appellee's injuries were proximately caused by appellant's violations of the Safety Appliance Act[2] and the Boiler Inspection Act[3]—specifically, in that (a) the motor car was not equipped with a power driving-wheel brake (air brake), (b) the push truck was not equipped with any brakes, and (c) appellant had directed appellee to operate a car and truck without sufficient braking power.

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[1] 35 STAT. 65 (1908), 45 U.S.C. §§ 51-60 (1952).

[2] 27 STAT. 531 (1893), 32 STAT. 943 (1903), 36 STAT. 298 (1910), 45 U.S.C. §§ 1-16 (1952).

[3] 36 STAT. 913 (1911), 38 STAT. 1192 (1915), 43 STAT. 659 (1924), 45 U.S.C. § 23 (1952).

The court below ruled and charged the jury that the provisions of the Safety Appliance Act were applicable to the vehicles in question. The issues on both causes of action were submitted to the jury, which found in favor of the appellee on "the issues aforesaid." This appeal is directed only to that part of the judgment which was based on the second cause of action.[4] Appellant contends: (1) the vehicles in question were not subject to the Safety Appliance Act and (2) appellee did not make a sufficient showing to go to the jury on the issue of whether the absence of the appliances allegedly required by the Safety Appliance Act was a proximate cause of the accident.

With respect to the first issue, appellant argues that the vehicles in question are exempt from the requirements of the Safety Appliance Act because of the proviso of § 6:[5]

> *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Both vehicles involved *were* four-wheel cars, one powered and braked, one with neither power nor brakes.

Appellee contends the exemption in § 6 refers only to *logging cars,* and in support of this argument cites the decisions in *Spokane & Inland Empire R.R.* v. *United*

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[4] Since the jury's determination does not reveal whether they found for plaintiff on both or simply one cause, error found on this appeal would call for a new trial, without any appeal as to the first cause of action.

[5] 27 STAT. 532 (1893), 29 STAT. 85 (1896), 62 STAT. 909 (1948), 45 U.S.C. § 6 (1952).

States, 241 U.S. 344 (1916); *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F.2d 227 (2d Cir. 1934), cert. denied, 294 U.S. 715 (1935); *Martin* v. *Johnston*, 79 So.2d 419, cert. denied, 350 U.S. 835 (1955). Appellant, however, correctly points to the fact that the statute as originally enacted simply said "*Provided*, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains." 27 STAT. 532 (1893). The legislative history (discussed *infra*) shows that this provision was directed in its enactment specifically to exempt *coal cars*. 24 CONG. REC. 1477 (1893). Subsequently, in 1896, the proviso was amended to include "eight-wheel standard logging cars." 29 STAT. 85 (1896). The legislative history indicates that the proviso was amended because standard logging cars were only eight-wheeled. H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

The cases cited by appellee on this point are not helpful. In *Hoffman* v. *New York, N.H. & H.R. Co., supra*, the court merely stated, without elaboration or explanation, that the exceptions in § 6 are limited to logging trains. In *Spokane & Inland Empire R.R.* v. *United States, supra*, the Supreme Court referred to the § 6 exemption, again without discussion, as if it covered only logging trains.[6] In *Martin* v. *Johnston, supra*, the court made no reference whatsoever to the applicability of § 6.

Although we do not believe the four-wheel car exemption in § 6 can be interpreted to apply solely to logging cars,[7] we do feel the legislative history demonstrates that Congress intended the four-wheel car exemption to be restricted to coal cars. The four-wheel car exemption was enacted in 1893 as part of the original Safety Appliance Act. The exemption was offered as an amendment

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[6] This case was concerned only with the street railway train exemption of § 8, 32 STAT. 943 (1903), 45 U.S.C. § 8 (1952).

[7] United States v. St. Louis-San Francisco Ry., No. 5522, District Court for the Eastern Division of Mo., May 11, 1922 (unreported).

to the original bill (H.R. 9350). The Senator offering the amendment stated:

MR. BLODGETT. I desire to offer an amendment. At the end of section 6 of the bill as reprinted I move to add the following proviso:

Provided, That nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from New Jersey [MR. BLODGETT] to the amendment of the committee.

MR. BLODGETT. Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used, because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that peculiar work. A hook arrangement and link are used with considerable lost motion between the cars.

It is necessary to use that appliance, as I said, in order to go around the sharp curves. *I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic, and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.*

MR. CULLOM. I have had some conversation with the Senator from New Jersey in reference to his amendment, and he being much more familiar with the general subject of running the four-wheel cars than I, I am inclined to think perhaps his amendment is correct. I shall make no opposition to it myself. I have no objection to its adoption.

MR. STOCKBRIDGE. Let the amendment be read.

The Secretary read Mr. BLODGETT's amendment to the amendment of the committee.

MR. STOCKBRIDGE. That is all right.

The amendment to the amendment was agreed to. [Italics supplied.] (24 CONG. REC. 1477 (1893).)

We do not believe we can ignore such a clear and compelling statement as to the intent of the proviso.[8] To hold otherwise would require us to say that a railroad could run entire trains of four-wheel maintenance and supply cars drawn by a powered tractor, also having four wheels, and disregard the admitted fact (J.A. 69-70) that unbraked vehicles behind the powered tractor extend the distance required to stop the train, thus exposing employees to substantially increased hazards.

Our conclusion is further reinforced by the fact that if the four-wheel car exemption is interpreted to cover all four-wheel cars, this means a four-wheel motor track car like the one appellee was driving need not even be

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[8] As the Supreme Court said in United States v. American Trucking Ass'ns., 310 U.S. 534, 543 (1940), "Frequently, however, even when the plain meaning [of a statute] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

equipped with hand brakes as required by § 11[9] of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h. We do not believe Congress intended such a result when it provided in § 11 that "all cars must be equipped with . . . efficient hand brakes." 36 STAT. 298 (1910), 45 U.S.C. § 11 (1952). The long-established command to interpret this act liberally to accomplish its declared objective, the safety of persons and trains,[10] no doubt guided the trial court, and we think correctly so.

We are aware that when the logging-car exemption was added in 1896 the House Report[11] stated, in referring to the original four-wheel exemption:

> In the original act of March 2, 1893, there is a provision at the end of section 6 which exempts trains composed of four-wheeled cars from the operations of the act. This was evidently intended to apply to logging trains, but it happens that the cars are of eight wheels and do not come within the exception.

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[9] Although the § 6 exemption is not referred to in § 11 of the act, § 16 provides:

> § 16. Application of provisions to common carriers and vehicles subject to "Safety Appliance Acts."
>
> The provisions of sections 11-16 of this title, as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in sections 1-10 of this title. (36 STAT. 298 (1910), 45 U.S.C. § 16 (1952).)

Since a four-wheel car is exempt from §§ 1-10 of the act, it would seem to be exempt from § 11.

[10] Lilly v. Grand Trunk Western R.R., 317 U.S. 481, 486 (1943); Brady v. Terminal R.R. Ass'n, 303 U.S. 10, 15 (1938); New York Central R.R. v. United States, 265 U.S. 41, 44-45 (1924).

[11] H.R.REP. No. 727, 54th Cong., 1st Sess. (1896).

Obviously, the draftsman of this 1896 report failed to read the 1893 legislative history for there is no support for the House Report's conclusion and we must view the statement in the 1896 House Report as one Congress' erroneous *post* legislative view of the intent of a prior Congress.

Appellant also argues that the motor track car in question is not covered by the act's § 1[12] requirement for air brakes and a train brake system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.

We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a "locomotive" only if it is actually used to haul standard railroad cars. In *United States* v. *Fort Worth & Denver City Ry. Co.*, 21 F.Supp. 916 (N.D. Tex. 1937), the court held that a locomotive crane which was used to haul three other cars was a locomotive within the meaning of § 1 of the Safety Appliance Act. The court stated at p. 918:

> . . . In other words, while the equipment is being used as a crane, and moved about at the scene of construction, it is still a crane and does not become a locomotive, but where, as here, it is used to haul cars for a distance up to two and one-half miles from a switch to the scene of construction, it is being used for the purposes for which a locomotive is used and is a locomotive within the meaning of the statute. While the equipment is being used as

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[12] This section provides in pertinent part:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system. . . . (27 STAT. 531 (1893), 45 U.S.C. § 1 (1952).)

a locomotive, it is a locomotive, regardless of whatever else it might also be.

The court in *Hoffman* v. *New York, N.H. & H.R.Co., supra,* held that a gasoline tractor which was hauling a hand car was a locomotive within the meaning of 45 U.S.C. §§ 1, 2.[13]

The I.C.C. order of December 14, 1925,[14] providing

> A locomotive is a self-propelled unit of equipment designed solely for moving other equipment.
>
> A motor car is a self-propelled unit of equipment designed to carry freight or passenger traffic, and is not to be considered a locomotive.

is a classification which cannot control the courts in this situation. That definition is for purposes other than those we must deal with here. Since the motor track car in the instant case was being used to move other equipment, the I.C.C. order does not preclude a conclusion, on the facts of this case, that the car was then a locomotive even though it was not designed *solely* for moving other equipment.

In the present case the motor track car was being used to haul another car, i.e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name.

Appellant's second contention is that appellee failed to carry the burden of proving that the absence of the type of brakes allegedly required by the Safety Appliance Act was a proximate cause of the accident.

---

[13] We do not believe the court based its decision solely on the fact that the "gasoline engine was frequently used to haul a long line of cars" (74 F. 2d at 232).

[14] In the Matter of Rules and Instructions for the Inspection and Testing of Locomotives Propelled by Other Than Steam Power in Accordance With the Act of February 17, 1911, Amended March 4, 1915, June 26, 1918, and June 7, 1924.

Appellee testified that if he had been driving the motor car alone without the truck, he could have stopped in about six to eight feet. Mr. Chrissinger, the Railroad's brake expert, testified that if the existing brakes lock[15] the wheels, the efficiency of the brakes would not be increased by increasing the brake power. Since this testimony was uncontradicted, it is suggested that air brakes would not have helped in any way to prevent the accident. However, this expert, on cross-examination, conceded that any unbraked portion of equipment behind the motored unit adds to the stopping distance of the entire train. Thus, the jury might reasonably find from the testimony that although air brakes on the motor car would not have been more efficient than the present brakes, the train, consisting of the motor car and push truck, would have stopped sooner if the push truck had been equipped with brakes controlled from the motor car (a train brake system)—i.e., that appellee either could have stopped before hitting the dog or could have slowed down sufficiently so that the impact would not have derailed the car.[16]

Affirmed.

---

[15] Appellee had testified that the brakes did lock the wheels of the motor car.

[16] It is sufficient under the Federal Employers' Liability Act that the injury result *in part* from defendant's negligence. 35 STAT. 65 (1908), 45 U.S.C. § 51 (1952); Schulz v. Pennsylvania R.R., 350 U.S. 523, 526 (1956); Coray v. Southern Pacific Co., 335 U.S. 520, 524 (1949).

Judgment Below

Filed June 7, 1956

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,013

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Appellant*,

v.

DANIEL T. JACKSON, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

Before: PRETTYMAN, DANAHER and BURGER, *Circuit Judges*.

JUDGMENT AND DECREE

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

It is further ORDERED by the Court that appellee herein recover from appellant his taxable costs on this appeal and have execution therefor.

Dated: June 7, 1956.

Per Circuit Judge Burger.

District Court Order

Filed Mar. 10, 1955

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4108-52

DANIEL T. JACKSON, *Plaintiff*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation, *Defendant*

ORDER

Upon consideration of defendant's motion to strike so much of plaintiff's complaint which alleges violations of the Safety Appliance Act, 27 STAT. 531 (1893) as amended, and upon consideration of briefs and memoranda of law submitted by plaintiff and defendant, it is hereby

ORDERED, ADJUDGED AND DECREED this 10th day of March, 1955, that defendant's Motion to Strike is hereby denied.

MATTHEW F. McGUIRE
Judge

District Court Memorandum

Filed May 10, 1955

MEMORANDUM TO THE CLERK

The Court adheres to its original position. It is not at all insensible to the practical argument advanced for the non-inclusion of the type of vehicle involved here under the Safety Appliance Act.[1]

[1] 27 Stat. 531-2 (1892) as amended, 29 Stat. 85 (1896).

The fact is, however, that there is authority of respectable character which supports the position already taken.[2] The Court in the Hoffman case took the view that the statute was unambiguous. This is sound and accordingly resort cannot be had to extrinsic aids to construction. Nor does the fact, if it is a fact and it appears to be such, that the Interstate Commerce Commission has never since the passage of this statute some sixty years ago taken any steps to regulate vehicles of the character here involved inhibit this view, because the rule is that where there is no ambiguity, executive construction cannot change the plain language of a statute. (District of Columbia v. Pearson, (1921), 50 App. D.C. 303, 271 Fed. 377; Kansas City Southern R. Co. v. U.S. (1919), 252 U.S. 147. Federal Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349, 352 is dictum and not helpful.)

MATTHEW F. McGUIRE
Matthew F. McGuire
United States District Judge

5/10/55

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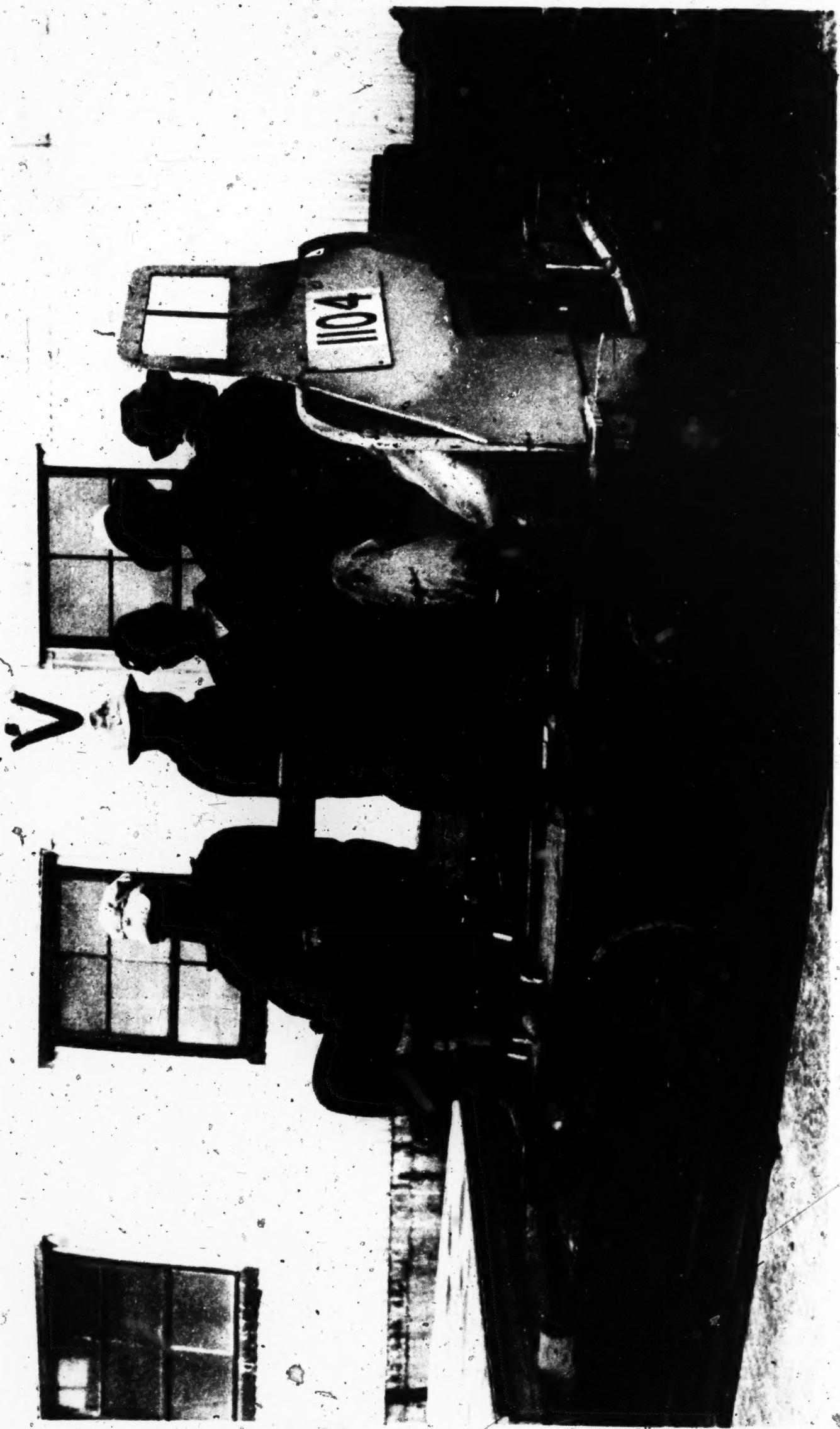
[2] Hoffman v. New York, N.H. & H.R. Co., 74 F. 2d 227, 232 (2d Cir. 1934); Spokane & Inland Empire Railroad Company v. United States, 241 U.S. 344, 350.

Defendant's Exhibit 13

Motor track car with push truck attached.



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No. 370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

REPLY BRIEF OF PETITIONER

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

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DANIEL T. JACKSON, *Respondent.*

REPLY BRIEF OF PETITIONER

With regard to questions of law presented by this case, petitioner will rely on its position as stated in the petition.

This reply is directed solely to a serious misstatement of fact, variations of which are repeated throughout respondent's brief in opposition. Apparently, respondent is attempting to suggest that the use of motor track cars to haul push trucks is unnecessary, unusual, and unknown to the Interstate Commerce Commission. For example, at page 5 of the brief in opposition respondent states:

> *"So far as this record discloses, such a use has never been made of these vehicles before."*

This statement, previously raised by respondent in the Court of Appeals and refuted there, is patently untrue.

The following are some excerpts from the record of testimony printed in the Joint Appendix in the Court of Appeals and submitted to this Court with the petition. The witness is respondent himself.

Record at p. 41:

> "Q. Now you testified you sometimes pulled that push truck with the motor car; is that right?"
>
> "A. That is right."

Record at p. 43:

> "Q. Wasn't anything unusual about operating a motor car and push truck on a rainy day; was it?"
>
> "A. No, sir."
>
> * * *
>
> "Q. That was just a standard procedure? That was the usual way you worked; isn't that right?"
>
> "A. The way I usually worked?"
>
> "Q. Yes."
>
> "A. Yes, sir."

Record at p. 48:

> "Q. And you didn't need that push truck on the way home; did you?"
>
> "A. Well always—when you take it out, you always take it back to the tool house."
>
> "Q. Well, don't you sometimes leave the push truck by the tracks overnight and you lock it up?"
>
> "A. Very seldom unless we are raising track."

Petitioner's Exhibit 13, showing a motor track car with push truck attached, was introduced into evidence

by petitioner in the trial court, forwarded with the record to the Court of Appeals, expressly designated a part of the record sent to this Court, and reproduced by petitioner and included at p. 17 of the appendix to the petition submitted here. This exhibit shows the normal use of these vehicles, a common sight to anyone who has even seen men working on the railroad.

The following stipulation, signed by counsel for both respondent and petitioner, appears at p. 78 of the Record:

> "9. That hand cars customarily used in the railroad industry in Maintenance of Way departments are equipped with four wheels; two axles; wooden frames; are *capable of being towed behind railroad motor track cars* and are not equipped with any kind of brakes." (Emphasis supplied)

If a track maintenance crew uses a motor track car to reach its place of work, it is nonsense to suggest, as does respondent, that a push truck "capable of being towed behind" a motor track car reaches the place of work in any other way.

Respectfully submitted,

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

October 9, 1956

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner*,

v.

DANIEL T. JACKSON, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	6
Argument	9
I. The Safety Appliance Act does not apply to the small maintenance of way vehicles involved in this case	9
A. Equipment which the Act requires	9
B. History of maintenance of way equipment	10
C. Section 1 does not apply to maintenance of way vehicles	13
(1) The language of Section 1 cannot be interpreted to cover these small vehicles	13
(2) The legislative history discloses no Congressional intent to include these vehicles	15
(3) Practical considerations indicate that Congress did not intend Section 1 to apply to maintenance vehicles	18
(4) The Commission has consistently interpreted the Act as not covering these vehicles	20
(5) State legislatures regulate motor track cars on the assumption that they are not locomotives	21
(6) No decided cases support the ruling of the lower court	22
D. Section II does not apply to the push truck	23

Page

II. If the Act does apply, these maintenance vehicles are expressly exempted by Section 6.... 26

III. This Court should adopt the Commission's interpretation of the Statute 30

Conclusion 36

Appendices:

A. Text of statutes involved 1a

B. State statutes re regulation of motor track cars 2a

C. Motor track car with push truck attached (Illus.) 4a

D. Push truck (Illus.) 5a

CITATIONS

CASES:

Adams v. *United States*, 319 U.S. 312 (1943) 33

Costanzo v *Tillinghast*, 287 U.S. 341 (1932)..... 31

Davis v. *Manry*, 266 U.S. 401 (1924) 31

Hoffman v. *New York, N.H. & H. R. Co.*, 74 F. 2d 227 (2d Cir. 1934), cert. denied 294 U.S. 715 (19), 22, 23, 28

Jacobson v. *New York, N.H. & H. R. Co.*, 206 F. 2d 153 (1st Cir. 1953) 9

Johnson v. *Southern Pac. Co.*, 117 F. 462 (8th Cir. 1902) 17, 19, 33

Logan v. *Davis*, 233 U.S. 613 (1914) 31

Martin v. *Johnson*, (Fla. 19) 79 So. 2d 419...25, 26, 35

Napier v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926) 21

Norwegian Nitrogen Products v. *United States*, 288 U.S. 294 (1933) 31

Shields v. *Atlantic Coast Line R. Co.*, 350 U.S. 318 (1956) 31, 32

United States v. *American Trucking Associations*, 310 U.S. 534 (1940) 33

United States v. *Fort Worth & Denver City Railway Co.*, 21 F. Supp. 916 (D.C. Tex. 1937).....22, 23

United States v. *Jackson*, 280 U.S. 183 (1930)..... 31

Wisconsin v. *Illinois*, 278 U.S. 367 (1929)..... 31

Page

STATUTES:

Ashpan Act:
45 U.S.C. §§ 17-21 10

Boiler Inspection Act:
45 U.S.C. §§ 22-34 10

Safety Appliance Act:
45 U.S.C. §§ 1-16 ..... 3, 4, 9, 20, 30, 32, 33, 35, 36
45 U.S.C. § 1 ..... 2, 4, 7, 9, 13, 14, 15, 16, 18, 19, 22
45 U.S.C. § 2 ..... 2, 9, 16, 19, 26
45 U.S.C. § 3 ..... 14, 15
45 U.S.C. § 4 ..... 10, 19
45 U.S.C. § 5 ..... 10, 19, 34
45 U.S.C. § 6 ..... 2, 3, 5, 9, 26, 27, 28, 29, 32, 34
45 U.S.C. § 8 ..... 2, 9, 10, 13, 17, 19
45 U.S.C. § 9 ..... 9, 17, 34
45 U.S.C. § 10 ..... 9, 17
45 U.S.C. § 11 ..... 2, 3, 5, 7, 10, 19, 23, 25, 26, 34
45 U.S.C. § 12 ..... 21, 25, 34
45 U.S.C. § 13 9
45 U.S.C. § 14 32
45 U.S.C. § 15 32
45 U.S.C. § 16 10

MISCELLANEOUS:

36 American Railway Engineering Association Proceedings (1935) 11, 12
Carbuilder's Dictionary 483-487 (1906) 12
49 C.F.R. §§ 131-136 ..... 18, 19, 21
28 Cong. Rec. 3129, 54th Cong. 1st Sess. (1896) 27
Hertel, History of Brotherhood of Way Employes (1955) 13, 18
H. Doc. No. 254, 57th Cong. 2d Sess., Jan. 9, 1903 .. 17
H.R. Rep. No. 1678 on H.R. 9350, 52d Cong. 1st Sess. (1892) 16, 33
H.R. Rep. No. 57, on H.R. 5702, 61st Cong. 2d Sess. (1909) 24
Interstate Commerce Commission:
Annual Report, 1889, 44-85, 84-101, 293-340 ..... 15, 32
Annual Report, 1891, 337 15
Annual Report, 1892, 70 15
Annual Report, 1909, 41 24

Page

Maintenance of Way Cyclopedia, 1st ed. 1921, p. 39 11
Master Car Builders' Dictionary and Cyclopedia .. 12
Mills, "Requirements of Federal Safety Appliance Law," 21 I.C.C. Practitioners Journal 398-404 ... 20
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31 Railroad Magazine, No. 4, March, 1942, ...10, 11, 12
85 Railway Age 726 (1928) 12
26 Railway Engineering and Maintenance (1930) .11, 12
Railway Engineering and Maintenance Cyclopedia:
2d ed. 1926, p. 340 12
6th ed. 1945 .....12, 13
8th ed. 1955, p. 6 12
S. Rep. No. 250, on H.R. 5702, 61st Cong. 2d Sess. (1909) 24, 25, 33
1 Sharfman, The Interstate Commerce Commission, 246, n. 4 (1947) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Petitioner,*

v.

DANIEL T. JACKSON, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the Record (R. 96). It is reported at 233 F. 2d 660. There was no reported opinion in the District Court. The order of the District Court denying defendant's motion to strike that part of the complaint which alleged violations of the Safety Appliance Act (R. 13), and the memoranda filed by the District Court on rehearing of defendant's motion to strike (R. 13-14) and accompanying an order denying defendant's motion for a new trial (R. 16) are also printed in the Record.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956 (R. 104). The petition for a writ of certiorari was filed on August 31, 1956, and was granted on November 5, 1956 (R. 105). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

As stated in the petition for certiorari, this case presents the single important question whether or not the Safety Appliance Act is applicable to four-wheel motor track cars and push trucks. This question may be considered from two different aspects:

1. Was it the intent of Congress that a motor track car should be considered a "locomotive," and a push truck a "car," and the two vehicles when coupled a "train" within the meaning of those terms in the Safety Appliance Act?

2. If Congress intended to include motor track cars and push trucks when the terms "locomotive," "car" and "train" are used, are not these four-wheel vehicles exempted by Section 6 of the Act which exempts "trains composed of four-wheel cars"?

STATUTES INVOLVED

The full texts of Sections 1, 2, 6, 8 and 11 of the Safety Appliance Act are printed in Appendix A to this brief. In pertinent part Sections 1, 6 and 11 provide:

Section 1, 45 U.S.C. § 1.

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train

can control its speed without requiring brakemen to use the common hand brake for that purpose.'' 27 Stat. 531.

Section 6, 45 U.S.C. § 6.

". . . *Provided*, That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'' 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

Section 11, 45 U.S.C. § 11.

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders . . .'' 36 Stat. 298.

STATEMENT OF THE CASE

Respondent, a Baltimore & Ohio Railroad Company section foreman, brought an action under the Federal Employers' Liability Act seeking damages for injuries sustained when a motor track car which he was driving struck a dog and overturned. The car was towing a four-wheel vehicle known as a push truck. Two other members of respondent's work crew were riding the car (R. 24), and tools were piled on the push truck (R. 25). This was a usual and customary method of going to and from the place on the line where work was to be done (R. 22, 41, 43, 48).

Respondent testified that the brakes worked properly at the time of the accident and locked the wheels when he pulled back the brake lever (R. 55). Accordingly, this case does not involve a defective appliance.

Two causes of action were alleged in the complaint, and the case was presented to the jury on two grounds: first, a claim of common law negligence (use of the motor track car on wet and slippery rails and an alleged failure to provide the motor track car and push truck with adequate braking power); and second, violation of the Safety Appliance Act. With regard to the latter, the jury was instructed over petitioner's objection:

> "Now, the other ground of recovery is based upon an Act of Congress known as the Safety Appliance Act.
>
> "Congress has required railroads to furnish certain equipment for the use of the operation of the railroad. Among those that are necessary—as in this particular case—was that the law required the railroad to have hand brakes on this truck, and to have brakes on the motor car controlling the brakes on both the truck and the motor car.
>
> "The evidence clearly showed, and it is admitted that this equipment was not furnished; and you will find, therefore, that if by reason of the failure to furnish that equipment, this accident happened, that that was the proximate cause or a contributing cause of the accident, then the Railroad is liable to the Plaintiff; and no negligence on the part of the plaintiff, himself, is a bar to his right to recover under the Railroad Safety Appliance Act." (R. 74)

Petitioner had sought to have the issue of violation of the Safety Appliance Act removed from the case by motion to strike which was denied before trial (R. 13-14), by proper objections to the instructions, and by a motion for a new trial which was also denied (R. 16). On appeal to the United States Court of Appeals for the District of Columbia Circuit the holding of the lower court was affirmed (R.

105). The opinion of the Court of Appeals appears at 233 F. 2d 660.

This case squarely presents the narrow question whether Sections 1 and 11 of the Safety Appliance Act (45 U.S.C. §§ 1 and 11) apply to maintenance of way vehicles such as track motor cars and push trucks. If the Act applies, the instruction was proper. If the Act does not apply, the instruction was clearly prejudicial and a reversal of the Court of Appeals' decision and remand to the District Court for a new trial on the issue of negligence alone is required.

A picture of a motor track car with a maintenance crew aboard and push truck attached and a picture of a push truck alone appear as Appendices C and D to this brief. The vehicles shown in these pictures are substantially identical to those involved in the accident (R. 38, 40). They are small four-wheel vehicles, weighing, as the Court of Appeals noted (R. 96) slightly over 800 pounds each (R. 41). The motor track car is powered with a gasoline motor, controlled with a throttle (R. 50), clutch and hand brake (R. 22). It is the successor to the familiar hand car of an earlier day.

Some 60,000 of these motor track cars are currently in use on American railroads (R. 77, 78). They are used with push trucks to carry maintenance crews and equipment from section houses to the locations out on the line where work is to be performed. Because these work sites may be miles away from the nearest switch, and because section crews en route to or from work may be met or overtaken by regular trains, maintenance vehicle must be light enough to be lifted and removed from the track by a three man crew to let the trains go by (R. 42). This had been done on the day of the accident (R. 35). Air brakes or a braking system by which the driver of the motor car can cause brakes to be applied on the push truck are not used on vehicles of this type (R. 41, 77, 78). Push trucks are not

equipped with brakes (R. 41, 77, 78), and are attached to motor cars with a simple non-automatic coupling device, as the pictures indicate. Appendices C and D. They are frequently operated by being pushed by hand (R. 23).

The Interstate Commerce Commission has never considered this equipment subject to the Act (R. 90-91), and neither the Commission nor the Department of Justice has ever sought to prosecute any railroad for failing to equip a motor car or push truck with the devices required by the Safety Appliance Act for locomotives, trains and cars (R. 73).

SUMMARY OF ARGUMENT

I. The Safety Appliance Act does not apply to the small maintenance of way vehicles involved in this case. On vehicles to which it does apply, the Act requires such appliances as power driving wheel brakes, a train brake system, automatic couplers, secure grab irons or hand holds, draw bars, secure sill steps and efficient hand brakes.

The motor track car and push truck involved here weigh slightly more than 800 pounds each. The push truck has been used since the first rails were laid, and the motor track car is simply a push truck propelled by a small gasoline engine. These vehicles in terms of origin, development and present use are entirely separate from locomotives and cars used in railroad trains.

Section 1 of the Act, which requires power driving wheel brakes and train brakes, speaks in terms of a "locomotive engine," "engineers," "brakeman" and "train". In the long history of American railroading these terms have never been used to designate maintenance of way equipment or the men who operate it.

The legislative history shows beyond question that in enacting the Safety Appliance Act Congress was concerned with the safety problem of railroad trainmen braking and

coupling regular trains. The Act's requirements were aimed directly at cutting the accident toll in this hazardous occupation. There are no brakemen on motor track cars and push trucks and no trainmen going between cars to couple or uncouple them. These vehicles are coupled simply by pushing them together by hand. Whether they ever could be equipped with air brakes, automatic couplers and the like is a matter of doubt. So far as is known, none has ever been so equipped.

The Interstate Commerce Commission—sponsor of the Safety Appliance Act and amendments to it and the agency responsible for administration of the Act—has never construed it as applying to these vehicles. The consistent administrative interpretation for sixty-three years has been that the Act does not apply.

In holding that the Act did apply in this case, the lower court held that the motor track car involved was a "locomotive." This holding is without precedent in any known case. It cannot be reconciled with the view of the railroad industry or the agency which regulates it. It is contrary to the view of some twenty-six state legislatures which have prescribed equipment for motor track cars on the assumption that they were not "locomotives." (Since Congress has preempted the field of regulation to locomotives, state legislation is precluded.)

Nor is there support for the holding of the court below that Section 11 of the Act requires push trucks to have hand brakes. The legislative history of Section 11 shows that it applies to train cars and not maintenance vehicles, and that its purpose was to require railroads to keep the hand brakes on freight cars in good repair to eliminate accidents in "humping" cars. These considerations are completely irrelevant to push trucks.

II. If, however, the Act is considered applicable to motor track cars and push trucks, the motor track car with push truck attached is exempt as a "train composed of four-

wheel cars" under Section 6 of the Act. The literal language of the exemption applies direcly to these vehicles. The legislative history of the original provision in 1893 and its amendment in 1896 shows that Congress intended to exempt vehicles to which it would be impossible or impracticable to attach Safety Appliance Act devices. Nothing in this history lends affirmative support to the proposition that the exemption was either written or intended to be restricted to coal cars. The designation "four-wheel cars" is a reasonable classification for the vehicles that Congress intended to exempt and the vehicles in this case come within the exemption, if under the Act at all.

III. The Interstate Commerce Commission's practical construction of the Act with regard to these vehicles is entitled to the greatest weight this Court accords to administrative interpretations. The Commission sponsored the Safety Appliance Act and its amendments. The Commission's interpretation that the Act does not apply to motor track cars and push trucks has been well-known to Congress which has never attempted to change it despite long-continued opportunity to do so.

Lastly, courts should not attempt on this type of record, made in a personal injury case, to determine questions of policy with respect to safety legislation, questions which should properly be resolved after investigation by Congress or by the Commission.

ARGUMENT

I.

The Safety Appliance Act Does Not Apply to the Small Maintenance of Way Vehicles Involved in This Case

A. EQUIPMENT WHICH THE ACT REQUIRES

The Safety Appliance Act (45 U.S.C. §§ 1-16)[1] makes it mandatory that certain types of equipment be used on railroad vehicles covered by the Act. Criminal penalties are imposed for each violation[2] and civil liability in damages under the Federal Employers' Liability Act follows as a matter of course.[3] Specifically, the Act applies to "all trains, locomotives, tenders, cars, and similar vehicles"[4] and requires that such vehicles be equipped with the following devices:

> A power driving wheel brake and appliances for operating the train-brake system on each locomotive engine. (Section 1) (This requirement has uniformly been met by installation of an air brake system.)
>
> Power or train brakes on every train. (Section 1)
>
> Couplers, coupling automatically by impact on all cars. (Section 2)

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[1] The Safety Appliance Act is contained in four acts of Congress. The first seven sections of the present Act became law on March 2, 1893, 27 Stat. 531. Section 6 was amended in 1896, 29 Stat. 85. Sections 8, 9, and 10 were added by amendment on March 2, 1903, 32 Stat. 943. The Safety Appliance Act of 1910, 36 Stat. 298, has been codified with the original Act as amended and appears in the U. S. Code as §§ 11 through 16. In its present form the entire Act appears in §§ 1 through 16 of Title 45, U. S. Code. References in this brief are to the U. S. Code Sections.

[2] See § 6, 27 Stat. 532 (1893) as amended, 45 U.S.C. § 6 (1952); § 13, 36 Stat. 299 (1910), 45 U.S.C. § 13 (1952).

[3] Speaking generally, in an action under the Federal Employers' Liability Act, violation of the Safety Appliance Act is, in effect, negligence *per se* and if such "negligence" is a proximate cause of the employee's injury, the railroad is liable under the Federal Employers' Liability Act *Jacobson* v. *New York, N.H. & H.R. Co.*, 206 F. 2d 153 (1st Cir. 1953).

[4] § 8, 32 Stat. 943 (1903), 45 U.S.C. § 8 (1952).

Secure grab irons or hand holds on ends and sides of all cars. (Section 4)

Draw bars at prescribed standard height on all cars. (Section 5) (A draw bar is a metal bar or arm to which the coupler is attached.)

Secure sill steps in all cars. (Section 11) (A sill step is a U-shaped iron attached to the sill of a car as a step for trainmen.)

Efficient hand brakes on all cars. (Section 11)

The appliances listed are required on *all* vehicles covered by the Act and if the vehicle is a "car" or "locomotive," it must be equipped with *all* the appliances prescribed by the Act for "cars" or "locomotives" respectively.[5]

Congress has passed additional legislation on the subject of safety. The Ashpan Act, 45 U.S.C. §§ 17-21 is not involved in this case at all because it deals only with steam locomotives. The Boiler Inspection Act, 45 U.S.C. 22-34, was referred to in the complaint and a violation was charged, but the District Court did not instruct the jury with respect to this Act and the question of its applicability was not passed upon in the Court of Appeals. Other safety legislation has no bearing on this case.

B. HISTORY OF MAINTENANCE OF WAY EQUIPMENT

The push truck of the present day has been in existence since the first use of rails.[6] It consists simply of a flat wooden platform supported on four flanged wheels and can be pushed or pulled along the rails by hand.

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[5] Congress clearly intended the Act to be read as a whole and a uniform interpretation to be given to each word describing the vehicles covered. Section 8, added in 1903, defines the vehicles covered by the entire Act, and § 16, added in 1910, 36 Stat. 298, provides that the sections added at that time (§§ 11-16) apply to every vehicle covered by the previous Act as amended.

[6] A German woodcut shows a push truck in use some twenty-five years after Columbus discovered America. 31 Railroad Magazine, No. 4, March, 1942, p. 11.

The motor track car evolved from the early push trucks. The first step occurred when someone, calling on his experience in poling a boat, applied the same method of propulsion to a push truck.[7] This method of locomotion proved impractical and soon gave way to a device consisting of hand cranks geared to the axle and operated by two men.[8] Next, the idea of the walking beam was borrowed from the old town fire pump and the well-known walking beam and gear-driven hand car was the result. Although this was a decided improvement, the hand car had its drawbacks, for it drew heavily on the energy of the men, and it was still slow.[9]

For many years, further progress awaited the development of a source of power that was simple, light, and dependable. In the latter part of the 19th century, railroads began to use a gasoline engine to drive the pumps on water service stations, and it was not long before ingenious track maintenance men adapted these engines to their push trucks and hand cars. Soon, almost every maintenance of way section gang had a push car or hand car equipped with a small gasoline engine which had been rigged up by the foreman or one of his gang.[10] Although the railroads provided the fuel and repairs, the engine for a track car was usually purchased by the foreman.[11]

Railway equipment manufacturers soon began to produce motor track cars for the railroad industry. Some authorities believe the first stock motor track car was marketed

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[7] 36 American Railway Engineering Association Proceedings 268 (1935).

[8] 26 Railway Engineering and Maintenance 5 (1930).

[9] 36 American Railway Engineering Association Proceedings 269 (1935).

[10] 31 Railroad Magazine, No. 4, March, 1942, p. 20.

[11] Maintenance of Way Cyclopedia, 1st ed. 1921, p. 39.

in 1883, [12] others that this ocurred in 1893,[13] and still others state that it did not occur until 1896.[14] However, by 1898 these vehicles appear to have come into general use, since a section foreman's handbook published in that year contained descriptions and diagrams of motor track cars.[15] *The Master Car Builder's Dictionary and Cyclopedia* (the first edition of which appeared in 1879) published information on the subject for the first time in 1906.[16]

Because motor track cars provide the only means by which track maintenance employees and their tools can reach all points on the railroad, this vehicle has been the work horse and an indispensable part of the equipment of the industry for decades. According to the authoritative *Railway Engineering and Maintenance Cyclopedia,* it would be impossible to maintain the nation's railroads properly without motor track cars.[17] In 1928 alone, approximately 4,800 motor track cars costing $1,200,000 were purchased.[18] Although no exact figures are available concerning the total number of motor cars in service, this figure was estimated twenty-five years ago at 60,000, representing a total investment of more than twelve million dollars.[19] At that time, the total number of motor cars in use was being increased at the rate of 2,000 per year and an additional 2,800 cars were being purchased annually to replace cars retired from service.[20]

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[12] Railway Engineering and Maintenance Cyclopedia, 6th ed. 1945, p. 37; 31 Railroad Magazine, No. 4, March, 1942, p. 31.

[13] 85 Railway Age 726 (1928).

[14] Railway Engineering and Maintenance Cyclopedia, 2nd ed. 1926, p. 340; 26 Railway Engineering and Maintenance 6 (1930); 36 American Railway Engineering Association Proceedings 269 (1935).

[15] Paine, The New Roadmaster's Assistant 148-150 (1898).

[16] Carbuilder's Dictionary 483-487 (1906).

[17] Railway Engineering and Maintenance Cyclopedia, 8th ed. 1955, p. 6.

[18] 26 Railway Engineering and Maintenance 6 (1930).

[19] Ibid.

[20] Ibid.

The standard reference work for maintenance equipment, states that the operation of motor track cars on main tracks, especially by a few men, includes an element of hazard; the safety of the men, and of train traffic as well, depends upon the speed with which the motor car can be removed from the track. Hence, light weight is of the utmost importance.[21]

It is clear the push trucks and hand cars had been in general use prior to 1893 when the first Safety Appliance Act was passed, and that motor track cars were in fairly general use prior to 1903, when Section 8 was added clarifying the coverage of the Act with respect to vehicles.

C. SECTION 1 DOES NOT APPLY TO MAINTENANCE OF WAY VEHICLES

(1) The Language of Section 1 Cannot Be Interpreted to Cover These Small Vehicles

Maintenance operations on a railroad are conducted by employees different from those who operate the trains. They are normally under a different company department. They represent a different craft and have traditionally belonged to a separate brotherhood, the Brotherhood of Maintenance of Way Employes.[22] The vehicles which they use for going to and from work are assigned to them, cared for and operated by them, and are never used by trainmen, the men who drive, brake, switch and handle trains.

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[21] Railway Engineering and Maintenance Cyclopedia, 6th ed. 1945, pp. 32-33.

[22] See Hertel, History of Brotherhood of Maintenance of Way Employes p. xi (1955).

"The Brotherhood of Maintenance of Way Employes is a railroad labor organization representing some 300,000 railroad maintenance of way workers in the United States and Canada . . . .

"You have often seen them putt-putting down the track on a motor car or working in groups renewing ties, replacing rail or refurbishing the right of way . . . .

"The work of the maintenance of way man is hazardous . . . usually his work is done under the hazards of train traffic, on the main line where he must keep a sharp lookout for trains . . ." *Ibid.*

Section 1 of the Safety Appliance Act reads as follows:

> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any *locomotive engine* in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the *train-brake system*, or to run any *train* in such traffic that has not a sufficient *number of cars* in it so equipped with power or *train brakes* that the *engineer* on the *locomotive* drawing such *train* can control its speed without requiring *brakemen* to use the *common hand brake* for that purpose," 27 Stat. 531. (Emphasis added.)

A small motor car used primarily to haul section hands and tools to and from work, and only incidentally to pull a flat bed push truck carrying more tools or supplies, would never be called a "locomotive engine" except in jest. To call it that is to call it a name by which it has never been known in everyday life or in railroad parlance. To term the motor car and push truck when hooked together a "train" and the section foreman "the engineer" is to give to common, clearly understood, non-technical terms a meaning which they have never had in normal usage. The necessary assumption that this combination of motor car and push truck would normally be operated, in the absence of a train brake system, with a brakeman operating a hand brake on the push truck has no basis in reality.

Section 3 of the Act is revealing on the subject of what Congress mean to cover by the terms "locomotive engines, trains and cars" in section 1. Section 3 provides:

> "When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this title, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with said section, with such power or train

brakes as will work and readily interchange with the brakes in use on its own cars, as required by sections 1-7 of this title." 27 Stat. 531.

It is obvious when Sections 1 and 3 are read together that Congress was referring to train cars in the usual sense, in other words, to freight cars which in normal use are transferred from one railroad to another to complete a shipment. The problem of Section 3 could not conceivably arise with maintenance of way vehicles.

The clearest and strongest expression of a congressional intent to include maintenance of way vehicles under this section would have to be found in the legislative history before such a holding could be justified.

(2) The Legislative History Discloses No Congressional Intent to Include These Vehicles

There can be no question that the original Safety Appliance Act grew out of a number of accidents in which railway trainmen had been killed or injured by being thrown from the tops of trains when they sought to apply hand brakes, or by being crushed between cars when they sought to engage the old fashioned link and pin couplers. A meeting of railway safety representatives of the various states had been held as early as 1889 on this subject and they had urged the Interstate Commerce Commission to take action.[23] The Commission had presented the problem to Congress in its annual report of 1889 and had continued to do so thereafter until the passage of legislation in 1893.[24]

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[23] See 1 Sharfman, The Interstate Commerce Commission 246, n. 4 (1947).

[24] Interstate Commerce Commission, Annual Reports, hereinafter referred to as Annual Reports. See Annual Report, 1889, 44-45, 84-101, 293-340; Annual Report, 1891, 337; Annual Report, 1892, 70.

The House Committee Report on the original Act refers to the reported "terrible slaughter of brakemen" and notes that "38% of the total number of deaths and 46% of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger would largely reduce the total loss of life and limb." [25]

The Act undertook to eliminate these two sources of injury by requiring train brakes, by which the speed of a train could be controlled "without requiring brakemen to use the common hand brake for that purpose," and by requiring couplers which could operate "without the necessity of men going between the ends of the cars." [26] That the safety hazard Congress sought to eliminate never had existed and never will exist with motor cars and push trucks is too clear to admit of argument.

The requirement of secure grab irons and hand holds in Section 4 had a similar purpose in mind. They were "something which the switchman or brakeman can seize to if he slips, instead of trying to clutch the side of a wet or perhaps icy car." [27] There is no place on a maintenance of way motor car or push truck where a grab iron or hand hold could serve such a purpose. Switchmen and brakemen have nothing to do with these vehicles.

Section 1 of the original Act did not purport to cover all locomotives or train cars used for any purpose on a railroad. The section referred specifically to locomotive engines and to trains used "in moving interstate traffic." Furthermore, Section 2 requiring automatic couplers applied to "any car" and did not specifically say locomotive

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[25] H.R. Rep. No. 1678, on H.R. 9350, 52nd Cong. 1st Sess. 1, 3 (1892).

[26] The quoted words appear in §§ 1 and 2 of the Act, 45 U.S.C. §§ 1, 2.

[27] H.R. Rep. No. 1678, *supra*, note 25 at 5.

or tender. The Circuit Court of Appeals for the Eighth Circuit had held in the case of *Johnson* v. *Southern Pac. Co.*, 117 F. 462 (8th Cir. 1902), that the locomotive was not a car so that it did not have to be equipped with an automatic coupler. In January of 1903, Edward A. Moseley, Secretary of the Interstate Commerce Commission, had written Congress asserting that the statute had been "rendered nugatory" by this decision.[28] Hearings were held before a Senate Committee and H. R. Fuller, the legislative representative of the Brotherhoods of Locomotive Engineers, Locomotive Firemen, Railway Conductors, Railroad Trainmen and Railroad Telegraphers vigorously urged an amendment to the original Safety Appliance Act of 1893 substantially broadening its coverage with respect to vehicles and train movements.[29]

The recommended legislation was passed by Congress on March 2, 1903, and added Sections 8, 9, and 10 of the present Act.[30] The Act was made applicable to common carriers in the District of Columbia and the territories and to all "trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce" or used in connection with vehicles so engaged. Mr. Fuller had supported the use of the words "similar vehicles" in order to be sure that the amended Act would apply not only to locomotives, tenders and cars but also to "cabooses, steam shovels, snow plows, scale cars, and similar conveyances," pointing out that these vehicles were used on trains and operated by trainmen.[31]

It is important to note that the amendment of 1903 was the occasion on which the problem of scope and coverage of the Act *with regard to vehicles* was analyzed. This amend-

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[28] H. Doc. No. 254, 57th Cong. 2d Sess., p. 2, Jan. 9, 1903.

[29] S. Rep. No. 1930, on S. 3560, 57th Cong. 1st Sess. 5-13, 24-58 (1902).

[30] 32 Stat. 943 (1903), as amended 45 U.S.C. §§ 8-10 (1952).

[31] S. Rep. No. 1930, *supra*, note 29, at 46.

ment was sponsored by the Commission and the Railroad Brotherhoods after several years experience under the Act. If the Commission or any group in the railroad industry believed that the Act should be extended to motor track cars and push trucks, this was the time that the position would have been stated. But in all the committee hearings not one mention of maintenance vehicles appears. Not one word was heard from representatives of the Brotherhood of Maintenance of Way Employees, founded in 1887.[32] Nowhere can there be found any indication that Congress had in mind extending the Act to cover any type of vehicle not used in the operation of regular trains.

In no subsequent amendment was the coverage of the Act with respect to vehicles altered.

(3) Practical Considerations Indicate That Congress Did Not Intend Section 1 to Apply to Maintenance Vehicles

The problems which compliance with Section 1 would pose for the railroads with respect to maintenance vehicles are so appalling that they demonstrate that Congress could never have intended this result. The train brake system in common use on the railroads today and indeed the system required by the Interstate Commerce Commission is an air brake.[33] Air brake equipment includes a compressor on a locomotive, air brakes on the wheels and hose connections between the cars. Whether vehicles the size of a motor car or push truck can as a practical matter be equipped with these devices is a matter of doubt. None has ever been so equipped. An air brake system could prevent the motor car and push truck from performing their normal function since it is imperative that a crew of three or four men be able to lift these vehicles from the track at the place of work (R. 42), or in an emergency en route, to permit the passage of regular trains. Furthermore, it has

[32] See Hertel, *op. cit. supra*, note 22, at pp. xvi and 14.

[33] Commission's Order No. 13528, 49 C.F.R. § 132.3.

never been determined on the basis of evidence or actual test that more abrupt stops are desirable with respect to this equipment. The Court of Appeals in this case merely assumed that this was so, although the evidence in the record (R. 65) was that too sudden a stop could throw the section gang from the car.

If the motor car and push truck are covered by Section 1, they must of necessity also be covered by Section 2, where the language "any car" is even broader.[34] If covered by Section 2, they must be equipped with "couplers coupling automatically by impact." This section, as its own terms make clear, was designed to obviate the necessity of "men going between the ends of the cars." However dangerous such a procedure may be in a case of box cars, gondolas, hopper cars and other standard train cars, the danger of injury from going between a motor car and push truck which will be pushed together for coupling *by hand* could hardly be a danger which Congress sought to eliminate. No safety reason exists for compelling maintenance of way vehicles to meet this requirement, and if they meet it with couplers of the type now in use weighing 200 pounds apiece (R. 90), it is not likely that a section crew will be able to lift the motor car and the push truck from the tracks.

An interpretation which places these vehicles under Section 1 must inevitably place them not only under Section 2, but under Sections 4, 5, 8 and 11 as well. Accordingly, the motor car and push truck would be required by statute to be equipped with useless grab irons or hand holds, with drawbars at a height of 31½ to 34½ inches [35] placing them several inches above the floor of the push truck, with secure sill steps to climb to nowhere, and with efficient hand brakes.

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[34] The words "any car" in § 2 have been construed broadly to include locomotives as well as other regular railroad cars. See *Johnson* v. *Southern Pac. Co.*, 196 U.S. 1 (1904).

[35] Commission's Order of Oct. 10, 1910, 49 C.F.R. § 132.2.

None of these devices performs a useful function. The hand brake would be of use only if a passenger were to ride the push truck, a less safe and less comfortable position than his regular place on the motor car.

Imposition of these requirements with respect to maintenance of way equipment would bring about a result quite different from any which the Safety Appliance Act has accomplished in other fields:

> "In reviewing these matters it should be pointed out that neither the law nor the orders of the Commission have required the use of anything that is new. All of the appliances which are required were developed in railroad service and were more or less in general use before there was any requirement of law that that must be used. The principal objective of the law was to require all railroads to adopt and use appliances which had been demonstrated to be essential to safety of railroad employment, and to provide that degree of uniformity and standardization necessary when cars are freely interchanged throughout all section of the country."[36]

(4) The Commission Has Consistently Interpreted the Act as Not Covering These Vehicles

The Interstate Commerce Commission has administered the Safety Appliance Act since the Act's inception. The Bureau of Safety & Service performs this function. Throughout the sixty-three years of its administration of the Act, the Commission has never ruled that motor track cars and

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[36] Mills, "*Requirements of Federal Safety Appliances Law*," 21 I.C.C. Practitioners Journal 398-404 (1954). Mr. Mills was Director of the Commission's Bureau of Safety at the time this article was written. In this regard it is significant that, with rare exceptions, Safety Appliance Act cases have turned on the issue of whether *existing* appliances were *defective*. In no other known case has the Act been held to require these appliances on a class of standard vehicles never previously equipped with them.

push trucks were subject to the Act and the Bureau has taken no cognizance of these vehicles (R. 84-92).

Pursuant to Section 12 of the Act, the Commission on March 11, 1913, published its Safety Appliance Standards Order specifying the number, dimensions and location of safety appliances required by the Act. This order, republished in 1946 (49 CFR, §§ 131-136), is presently in effect. It nowhere mentions motor track cars or push trucks, and the Commission has never prescribed standards for these vehicles (R. 87).

(5) State Legislatures Regulate Motor Track Cars on the Assumption That They Are Not Locomotives

This Court has held that Congress has completely preempted the field of regulation with respect to locomotives so that state legislation is precluded. *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926). And the Court was speaking of "locomotives" as the term is used in the Safety Appliance Act:

> "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. . . . But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. . . ." 272 U.S. at 611.

In the Court's own words, "state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field." 272 U.S. at 613.

Yet, with respect to motor track cars, laws enacted by the legislatures of no less than twenty-six states are in effect today. **References to these laws appear in Appendix B to this brief.**

(8) No Decided Cases Support the Ruling of the Lower Court

The decision of the Court of Appeals thus comes as a surprise to the men engaged in the industry, to the Commission which regulates it, and to the legislatures of twenty-six states which have consistently assumed that their own jurisdiction in the field is clear. The assumption was a reasonable one because, this proceeding aside, *no court has ever held that Section 1 of the Safety Appliance Act applies to maintenance of way vehicles.*

The cases relied upon by respondent in argument below and by the Court of Appeals and District Court in deciding this case, do not so hold. The two decisions which apply Section 1 to motive power other than standard railroad locomotives can be readily distinguished. Thus, *Hoffman* v. *New York, N. H. & H. R. Co.*, 74 F. 2d 227 (2d Cir. 1934), held that Section 1 applied to a "gasoline tractor," "locomotive," or "engine" concerning which the court said, "[it] was frequently used to haul a long line of cars, and there was as much reason for its being equipped to control their movements, as though it had been a steam locomotive employed for a similar purpose." 74 F. 2d at 232. The cars to which the court referred were standard railway cars. The gasoline locomotive was equipped with a standard automatic coupler because of the use to which it was normally put.

The case of *U. S.* v. *Fort Worth & Denver City Ry. Co.*, 21 F. Supp. 916 (D. Tex. 1937), involved a "Browning steam locomotive crane" which was engaged in hauling a tender and standard railroad flat cars to and from the place where the crane was employed unloading heavy boulders carried on the cars. It is interesting to note that this case was brought by the Federal Government as a prosecution under the Safety Appliance Act and the Interstate Commerce Commission took the position that Section 1 applied to the locomotive crane when it was being used as a locomotive.

The gasoline tractor in the *Hoffman* case and the locomotive crane in the *Fort Worth & Denver City* case both were regularly used to haul standard railroad cars over the tracks in movements which were, in the commonly accepted meaning of the term, train movements. So employed they present a totally different problem than does a small maintenance of way motor car, used to haul workmen to and from a place of work and on occasion to pull a small push truck under conditions which require that both vehicles must be lifted from the track by three or four men.

D. SECTION 11 DOES NOT APPLY TO THE PUSH TRUCK

The Court instructed the jury that the push truck was required to have a hand brake (R. 74). It is true that Section 11 makes it unlawful for any common carrier subject to the Act to haul "any car subject to the provisions of sections 11 to 16 of the Act" unless that car is equipped with "efficient hand brakes." Presumably, the words "any car" standing alone could include the push truck involved in this case. It is immediately apparent, however, that the statute was not intended to include every conceivable car owned or operated by a railroad and to require that all these cars be equipped with the safety devices. Accordingly, some reference to the legislative history is helpful to determine the Congressional intent.

Section 11 was added to the Safety Appliance Act in 1910.[37] The original Act in 1893 had established the basic requirements. The amendment in 1903 had broadened the coverage of the Act with respect to vehicles and train movements. The problem which the 1910 legislation sought to meet was a need for standardization in the safety appliances used; the lack of uniformity was itself causing injuries. President Taft had said in his annual message in the preceding year, "In addition to the foregoing amend-

[37] 36 Stat. 298 (1910), 45 U.S.C. § 11 (1952).

ments to the interstate commerce law, the Interstate Commerce Commission should be given the power, after a hearing, to determine upon the uniform construction of those appliances—such as sill steps, ladders, roof hand holds, running boards, and hand brakes on freight cars engaged in interstate commerce used by the train men in the operation of trains, the defects and the lack of uniformity in which are apt to produce accidents and injuries to railway train men."[38]

The House Committee report had stated the same problem:

> "At the present time and for many years in the past various railroads have had different methods of equipping their cars, and frequently the same railroad does not equip all of its own cars in the same manner, so that practically every freight train on every railroad has several methods and places for the various devices and appliances necessary for the use of railroad employees."[39]

The Commission in its annual report of 1909 had said:

> "The strongest argument for the extension of this law here recommended is found in the necessity to secure uniform equipment. It is of vital importance to employees that appliances designed for their safety shall be placed alike on all cars of the same class so that they will know with certainty night or day that they will always find them in like occasions."[40]

Uniformity was imperative because *trainmen* working *trains* by day and by night would operate under much safer conditions if the appliances they needed—sill steps, ladders,

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[38] Quoted in S. Rep. No. 250, on H.R. 5702, 61st Cong. 2d Sess. 2 (1910).

[39] H.R. Rep. No. 57, on H.R. 5702, 61st Cong. 2d Sess. 1 (1909).

[40] Annual Report, 1909, 41.

running boards, grab irons and the like—were uniform in character and were located in the same place on all cars regardless of the railroad from which they came. The purpose of the new law and the language used to describe it again emphasized the point that Congress was dealing with the problems of "freight cars" and "train men" operating "trains" as President Taft said. They were concerned with "freight trains" in the Committee's words. Congress indicated no intention of imposing any of these requirements of the statute on maintenance of way vehicles.

The point is underlined by what the legislative history discloses as the reason why the amended Act required an efficient hand brake. The Senate report points out that with the widespread use of air brakes, railroads were permitting hand brakes to become inoperative or defective.[41] As a result trainmen "humping" cars in yards (switching cars by gravity in yards where a mound or hump is provided) were being injured when cars got away as a result of defective hand brakes. Again, this problem has nothing whatsoever to do with push trucks which are easily pushed by hand by the section gang.

Under Section 12, the Commission was given the authority to determine the number, dimensions, location and manner of application of the appliances provided for in Section 11. Needless to say the Commission has never issued an order which requires hand brakes on maintenance of way push trucks. The ruling of the Court of Appeals gives Section 11 an effect which its sponsor and administrator, the Commission, never sought and never approved and which Congress never intended.

Aside from the lower courts in this case, but one other court has held that Section 11 applied to maintenance of way vehicles. In *Martin* v. *Johnson*, 79 So. 2d 419 (Fla. 1955), the Florida court held that a violation of Section

[41] S. Rep. No. 250, *supra*, note 38, at 2.

11 was involved if a motor track car did not have efficient hand brakes. The court, however, apparently did not have the legislative history of the Safety Appliance Act before it and assumed that it could apply the various sections on a piecemeal basis, relying on its own view of the exigencies of the situation. After agreeing that there was a serious question as to whether a track motor car would be a "car" within Section 2 (so that automatic couplers would be required) when it was operated alone, the court said:

> "There being as much reason for requiring the motor car in question to be equipped with efficient hand brakes to insure its safe operation when propelled under its own power, as there is for the requirement that such a car be equipped with automatic couplers, where it is to be used in connection with a train movement, we have the view that the Safety Appliance Acts are applicable and that we are not authorized to depart from the literal terms of the Statute." 79 So. 2d at 420.

To the Florida court, the Safety Appliance Act represents a grab bag from which the court can select and apply a requirement under the pretense of interpreting the word "car" in this statute whenever the court, without the benefit of an investigation, deems the requirement to be desirable.

II.

If the Act Does Apply, These Maintenance Vehicles Are Expressly Exempted by Section 6

The following proviso appears on Section 6 of the Safety Appliance Act as passed in 1893:[42]

> "*Provided,* That nothing in this Act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains."

The proviso was apparently an amendment made from the floor in the course of the debates on the Act of 1893. Rele-

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[42] 27 Stat. 532 (1893).

vant statements made on the floor of the Senate are quoted in the printed record in this case (R. 6-7).

Senator Blodgett offered the amendment explaining that coal was transported from mine to seaboard in four-wheel cars because only these cars, as distinguished from eight-wheel cars, could negotiate the turns and grades from the junction points on the regular railroad lines up to the coal mines. As a practical matter, cars "such as are used in that traffic," i. e. four-wheel cars, could not be equipped with the appliances and devices required in the original Safety Appliance Act, in particular with a train brake system and with automatic couplers.

The amendment could have been limited expressly to coal cars by the addition of one word, but was not. There was no reason why it should be so limited. The fact that a car carried coal had little to do with the question whether it could be equipped with power brakes and automatic couplers. The fact that it had four wheels was clearly relevant to that question because the number of wheels was an indication of the size, strength, and construction of the car.

In 1896, the proviso was itself amended for the purpose of enlarging the exemption to include certain types of logging cars. Senator Walcott explaining the bill to the Senate immediately before its passage stated:

> "the effect . . . is merely to provide that trains used exclusively for logging may be relieved from the provisions of the act. The cars used in logging trains, of which there are about 400 in the United States, are only 24 inches high, and it is physically impossible to equip them with grab irons and the other appurtenances required by law."[43]

As amended the proviso reads:

> "*Provided*, That nothing in this Act contained shall apply to trains composed of four-wheel cars or to

[43] 28 Cong. Rec. 3129, 54th Cong. 1st Sess. (1896).

trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.''[44]

Nothing in the legislative history of the 1896 amendment indicates any intention to restrict the scope of the previous exemption, and nothing in the 1896 discussions lends support to the proposition that the previous amendment was intended to apply *only* to coal cars.

It is, of course, petitioner's position that the Safety Appliance Act does not apply at all to the small motor cars and push trucks which railroads use for maintenance of way purposes, that the word ''locomotive'' when it appears throughout this Act means locomotive in the usual sense—railroad engines which pull trains—and that the word ''car'' when it appears in this Act means a railroad car normally hauled on the railroad as part of a train.

If, however, the word ''locomotive'' and the word ''car'' when they appear in the other sections of the Act are broad enough to include motor track cars and push trucks, then those same words when they appear in the proviso of Section 6, are broad enough to include motor track cars and push trucks. If the motor car and push truck attached constitute a ''train'' composed of ''cars'' under Section 1, then the train is most certainly a ''train composed of four-wheel cars'' under Section 6 and accordingly is exempted.

In the *Hoffman* case,[45] the court merely stated that ''the

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[44] 29 Stat. 85 (1896). When § 6 was codified the words ''nothing in Sections 1-7 of this title'' were substituted for ''nothing in this Act contained.'' With the exception of this technical correction, the 1896 exemption provision exists verbatim in the present Code. 45 U.S.C. § 6 (1952).

[45] *Hoffman* v. *New York, N.H. & H.R. Co.*, 74 F. 2d 227 (2d Cir. 1934), cert. denied 294 U.S. 715. See text *supra* at p. 22.

exemptions in Section 6 are expressly limited to 'logging' trains." The Court of Appeals in the present case correctly rejected this holding after a review of the legislative history of the proviso as originally enacted in 1893 and as amended in 1896. The Court of Appeals, however, went further and held that the first part of the exemption, the reference to trains composed of four-wheel cars, exempts coal cars alone. This holding imposes a limitation on Section 6 which Congress itself did not see fit to impose either when the provision was first enacted or when it was amended. It disregards the plain language of Section 6 to reach the result now before this Court.

The Court of Appeals gave two arguments in support of its conclusion. The first consisted of the Court's own illustration—without support in this record or common experience—that if the Act did not apply, a railroad might run "entire trains of four-wheel maintenance and supply cars drawn by a powered tractor."[46]

The first comment to be made with respect to this argument is that the Safety Appliance Act was intended to apply to railroad vehicles as they were used on the railroads. It surely was not designed to impose onerous requirements on equipment presently used in a safe manner on the mere assumption that the equipment might some day be used in an unsafe manner, particularly where the assumption is based on nothing more than conjecture. Second, a train of four-wheel coal cars, admittedly exempt, would present safety hazards as great as, if not greater than, a train of four-wheel maintenance cars. Third, the practical difficulty of equipping a car with the required safety devices would certainly be greater with maintenance vehicles than with coal cars. The additional weight which would render maintenance vehicles useless would not even be noticed on a coal train.

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[46] 233 F. 2d at 663.

The Court of Appeals had a second reason for excluding maintenance vehicles from the plain language of the exemption. Unless covered,

> "a four-wheel motor track car like the one appellee was driving need not even be equipped with hand brakes as required by § 11 of the act, even though that car might be driven along a slippery railroad track at 20 m.p.h."[47]

As has been pointed out previously, the railroad industry and the Commission have taken for granted for the last half century that this equipment was not subject to the Safety Appliance Act, yet the motor car in this case was equipped with a hand brake sufficiently effective to lock the wheels when applied by the section foreman (R. 55). If, over the years, there had been a problem of inadequate braking power on these cars, there can be no doubt that the state legislatures which had required windscreens, headlights and other appliances for motor cars[48] would have required brakes. It is sufficient to say that for the past sixty years builders have manufactured and employees have driven motor track cars equipped with efficient hand brakes. A strained construction of this exemption is not justified by a desire to protect employees against a hazard which does not exist.

III.

This Court Should Adopt the Commission's Interpretation of the Statute

It is a well-settled principle of law that "[n]othing is more convincing in interpretation of a doubtful or ambiguous statute" than a uniform practice of the responsible

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[47] Id. at 664.

[48] A list of the statutes of twenty-six states which regulate the equipment required on motor track cars is provided as Appendix B to this brief. See text *supra* at p. 21.

administrative agency. *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929). See *Logan* v. *Davis*, 223 U.S. 613, 627 (1914).

This is particularly true when the interpretation is a long-standing one and well known to Congress which has had a long continued opportunity to correct it if it is wrong. *Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294, 313 (1933). *United States* v. *Jackson*, 280 U.S. 183, 196-7 (1930). Failure of Congress to alter a statute after a consistent administrative interpretation of long standing creates a presumption in favor of the administrative interpretation to which this Court should give great weight. *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

The rule in question has been applied by this Court to interpretations which the Interstate Commerce Commission has given to the Safety Appliance Act. In *Davis* v. *Manry*, 266 U.S. 401 (1924), the Court ruled that the word "roof" in Section 11 (45 U.S.C. § 11, § 2 of the Safety Appliance Act of April 14, 1910) meant "roof" in the usual sense so that a grab iron was not required on the flange at the rear of a locomotive tender. The Commission had not required a grab iron in this location on a tender. The Court said:

> "The omission to require a grab iron is a practical construction by the Commission—the tribunal to which the application of § 2 [Section 11] was intrusted, and which would be solicitous to enforce it—that it applies to cars with roofs, and not to tenders, they having no roofs. While the view of the Commission is not conclusive with us, it is properly persuasive. We agree with it." 266 U.S. at 404-405.

The case of *Shields* v. *Atlantic Coast Line*, 350 U. S. 318 (1956), is not inconsistent with *Davis* v. *Manry* on the proposition that this Court should be persuaded by a practical construction of the statute made by the Commission. In the *Shields* case, this Court said:

> "Omission of dome running boards of itself shows no more than that the Commission has not standardized

all possible running boards within § 2. *Davis* v. *Manry*, 266 U.S. 401, is consistent with our view. * * * Moreover, the Commission in that case, having standardized the ladder, had no alternative but to interpret the statutory word 'roofs' by either standardizing the grab iron or not standardizing it. Here no such practical construction is implied by the failure to standardize." 350 U.S. at 322.

In the *Shields* case the Court did not follow an interpretation of the statute by the Commission because in its view no such interpretation had been made.[49] A similar argument cannot be made in the case at bar. The problem here is not one of standardization, a discretionary function of the Commission. The problem is one of enforcement of the Act, a duty imposed upon the Commission by Sections 6, 14 and 15 of the Act. Since it has been obvious to every Commission safety inspector since 1893 that the widely used maintenance vehicles were not equipped with train brakes, couplers, grab irons and sill steps, the failure of the Commission to prosecute the railroads can only be explained on the ground that the Commission holds the view that these appliances are not required. The Commission is before this Court urging that position.

There are unusually persuasive reasons why this Court should adopt this interpretation of the Safety Appliance Act by the Interstate Commerce Commission. In the first place, the Commission played an important role in writing this legislation. The Commission had presented the problem to Congress in its Annual Report of 1889 and had recommended legislation in 1890, 1891 and 1892.[50] The

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[49] The *Shields* case can be readily distinguished from the present case. There the court felt that the force of the Safety Appliance Act should be employed, in addition to the common law requirement of due care, to make sure that dome steps in common use on tank cars be kept in good condition. In this case, the Court of Appeals has required the use of appliances on a whole class of railroad vehicles which have never previously been so equipped.

[50] See note 24 *supra*.

House Committee Report (June 27, 1892) which reported out the bill which became the Safety Appliance Act of 1893 pays tribute to the efforts of Edward A. Moseley, "the efficient Secretary of the Interstate Commerce Commission . . . whose experience gained from years of devotion to this reform and the data in his possession were invaluable aids to its investigation."[51]

Mr. Moseley had urged amendment of the legislation in 1903 after *Johnson* v. *Southern Pac. Co.* was decided in the Circuit Court of Appeals,[52] and the Senate Committee Report contains a long excerpt from the Commission's Annual Report of the previous year.[53] As to the third major change in the Act, the Senate Committee Report reporting out the bill which later became the Safety Appliance Act of 1910 pointed out that the Commission had for several years recommended an extension of the law so as to cover all appliances included in the Master Car Builder's standards for the protection of trainmen.[54]

It is therefore no exaggeration to say that the Commission has played an important role in fashioning the legislation which it has interpreted. It sponsored and recommended the original Act and each major revision of it in order to meet safety problems which it had studied and analyzed and which it had reported to Congress. In this context the Commission's view as to the type of vehicle which Congress intended the Act to cover is entitled to great weight. It has been held that the views of governmental agencies cooperating in developing a statute are especially persuasive in construing it. *Adams* v. *United States*, 319 U.S. 312, 315 (1943). *United States* v. *American Trucking Associations*, 310 U.S. 534 (1940).

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[51] H.R. Rep. No. 1678, *supra*, note 25, at 8.

[52] 117 F. 462 (8th Cir. 1902).

[53] S. Rep. No. 1930, *supra*, note 29, at 81-100.

[54] S. Rep. No. 250, *supra*, note 38, at 2.

It is significant also that the Safety Appliance Act manifests a remarkable degree of reliance by Congress on the Commission for *substantive* decisions with respect to the Act. Thus the very decision of when the Acts were to become effective in the first place was delegated to the Commission.[55] The Commission has extensive power under the Acts to prescribe standards. The height of draw bars under Section 5 was to be certified to the Commission by the American Railway Association within a specified time or prescribed by the Commission if this was not done.[56] Section 12 authorized the Commission to designate the number, dimensions, location and manner of application of the appliances which Section 11 required.[57] Section 9 authorized the Commission to increase the minimum number of cars which had to be equipped with train brakes from the 50% required in the legislation and the Commission did so.[58] Section 6 charged the Commission with the duty of lodging with the proper district attorneys information of such violations of the Act as might come to its knowledge.[59] Congress has relied heavily on the Commission's ability to interpret the Act properly and has never felt called upon to amend the Act in order to change an interpretation given it by the Commission.

Discovery of a congressional intent by a court, an intent previously unknown to the Commission, indeed anomalous. The Commission's Bureau of Safety and Service, through its staff of inspectors, down through the years has kept a watchful eye over the safety problems in the industry. If there had been any intention of Congress to include maintenance of way vehicles under the Safety Appliance Act, that intention would in all prob-

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[55] Section 7 of the original Act so provided, 27 Stat. 532 (1893). This section was eliminated as moot when the Act was codified.

[56] 27 Stat. 531 (1893).

[57] 36 Stat. 298 (1910), 45 U.S.C. § 12 (1952).

[58] 32 Stat. 943 (1903), 45 U.S.C. § (1952).

[59] 27 Stat. 532 (1903), as amended 45 U.S.C. § 6 (1952).

ability have originated in the discovery of a need for regulation by the Commission's staff.

The question posed in this case is simply whether the Safety Appliance Act is to be applied to maintenance of way vehicles. The words which the statutes use, words like "locomotive," "train," "engineer," "sufficient number of cars," etc., do not require this result; to reach it they must be stretched so far beyond their normal meaning that they no longer constitute guides for decision. The legislative history contains nothing which requires this result or even supports it. The sole and only possible basis for reaching such a conclusion must be a belief that safety considerations require it. This is the ultimate decision which the Court of Appeals made in this case. This is clearly the decision which the Florida Court made in *Martin* v. *Johnson, supra.*

It is submitted that the issue whether safety considerations require this change cannot be adequately analyzed and properly decided in this type of proceeding. The question can be better studied and can be decided with far more assurance in a proceeding before the Commission or before a congressional committee where an analysis can be conducted with the benefit of accident statistics over the years, testimony of representatives of the Brotherhoods as to safety needs, and of the railroad officials as to the practical problems presented, and recommendations of experts on the Commission's staff.

The type of inquiry which is called for here is plainly impossible in a personal injury case tried by private litigants before a jury. Much of the evidence on which the Commission or Congress might well rely would not even be admissible in such a proceeding. Practical considerations would prevent it from being offered. Yet an affirmance of the lower court's decision will place these vehicles under the law for the first time just as completely and just as effectively as would an amendment of the Safety Appliance Act by Congress, made after full investigation.

CONCLUSION

An extension of the Safety Appliance Act to cover maintenance of way vehicles would be the first major change in safety legislation on the railroads not advocated by the Interstate Commerce Commission. It would certainly be the first increase in the scope of this legislation made over the Commission's opposition.

Nothing in the language of the legislation requires this result. It can only be reached by doing violence to the plain meaning of the words which Congress used. No purpose which Congress sought to serve would be accomplished by the proposed extension of the Act. Instead, a series of serious practical problems would be created without a showing of need and without the benefit of any factual inquiry whatsoever.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals must be reversed and the cause remanded to the District Court for a new trial.

STEPHEN AILES,
LAIDLER B. MACKALL,
Attorneys for Petitioner.

STEPTOE & JOHNSON,
Of Counsel.

January 2, 1956.

APPENDIX A

Text of Statutes Involved

45 U.S.C. § 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 27 Stat. 531.

45 U.S.C. § 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdicion in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

45 U.S.C. § 8. The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. 32 Stat. 943.

45 U.S.C. § 11. It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 36 Stat. 298.

APPENDIX B

Citations to Pertinent Statutes of Twenty-Six States Which Regulate Equipment Required on Motor Track Cars

Arkansas: Ark. Stat. (1947) sec. 73-740 (Pocket Part 1951);
California: C. 1340 Calif. Stat. (1953) Pub. Util. Code Sec. 7612;
Connecticut: Secs. 1956c and 1957c, 1953 Supp. to Conn. Gen. Stat.;
Idaho: C. 89, 1953 Session Laws Secs. 62-420 to 62-423 Idaho Code, Cum. Pocket Supp.;
Illinois: 1951 Smith-Hurd, Ill. Stat. Ann. C. 114, secs. 188a, 188b;
Indiana: Burns Indiana Stat. (1955) secs. 55-1257 to 1259;
Iowa: Sec. 477.22 Iowa Code (1954);
Kentucky: KRS 277.245 and 277.990 (1952);
Maine: C. 46, sec. 79, Rev. Stat. of Maine, 1954;
Maryland: Acts of Md. 1949, c. 495 (not yet codified);
Massachusetts: C. 430, Acts of 1952 and c. 174, Acts of 1951;
Michigan: Mich. Stat. Ann., secs. 22.965, 22.966, 22.968(1), 22.968(2);
Minnesota: Minn. Stat. Ann. 1949, sec. 219.561;
Nebraska: Sec. 74-592 to 593, Rev. Stat., 1950 Supp.;
Nevada: C. 179, p. 209, 1953 Stat.;
New Hampshire: N. H. Rev. Stat. Ann., secs. 370.10, 370.11;
North Dakota: Secs. 49-1327, 49-1328 (1953 Supp.) No. Dak. Rev. Code (1943);
Ohio: Ohio General Code, Sec. 614-3;
Oklahoma: 66 Okla. Stat. sec. 96.1, 1953 Session Laws (Windshields);
Oregon: ORS 761.320 (1953);
Tennessee: William's Tenn. Code Ann., 1952 Supp., sec. 26709;
Utah: 56-125 Utah Code Ann. 1953 (Pocket Part);
Vermont: Public Act No. 209 p. 203 (1953);
Virginia: Secs. 56-413.1 and 56-413.2, Pocket Part (1954);
Washington: Rev. Code of Wash., sec. 81.44.101-105;
Wisconsin: Wisc. Stat. Secs. 192.266 and 192.268 (1953).

APPENDIX C

Defendant's Exhibit 11

Motor Track Car With Push Truck Attached

Push Truck

APPENDIX D

Defendant's Exhibit 12

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FILED
MAR 27 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Introductory Statement	1
I. The Question Presented	2
II. Unprecedented Use of the Vehicles	4
III. Administrative Interpretation of the Commission	4
Appendix	7

CITATIONS

CASES:

Baltimore and Ohio Railroad Company v. *Jackson*, 233 F.2d 660 (D.C. Cir. 1956)	2
Ex Parte No. 179, 297 I.C.C. 177 (1955)	4, 5, 7
Gilvary v. *Cuyahoga Valley R. Co.*, 292 U.S. 57 (1934)	5
Napier v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926)	5

STATUTES:

Boiler Inspection Act (45 U.S.C. §§ 22-34)	5
Safety Appliance Act (45 U.S.C. §§ 1-16)	1, 2, 3, 4, 5, 6
45 U.S.C. § 6	3, 4

MISCELLANEOUS:

Rule 23(1)(c), Revised Rules of The Supreme Court of the United States	3

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---

REPLY BRIEF FOR THE PETITIONER

Respondent's brief is devoted principally to an assertion of the general proposition that the Safety Appliance Act must be construed liberally in favor of railroad employees, a proposition which does not furnish a basis for deciding this specific case. Several points raised in Respondent's brief, however, relate to matters not discussed in Petitioner's original brief and accordingly merit comment in reply.

I.

THE QUESTION PRESENTED

While Respondent does not appear to press seriously his assertion that the writ should be dismissed, his characterization of the question presented involves something in the nature of a claim of surprise that he should have to face the basic question whether the Safety Appliance Act applies to these small maintenance vehicles at all.

[An] instruction in the case informed the jury that the Safety Appliance Act required a hand brake on the truck and a train brake system for both vehicles (R. 74); it was objected to on the ground that the Act did not apply (R. 16, 19). At each stage of the proceeding, petitioner has contended, stating the simpler proposition first: (1) that the Section 6 exemption applies, and (2) that the motor track car was not a "locomotive" under the Act. This second argument was presented to and passed on by the Court of Appeals.[1] It was again urged in the Petition for Certiorari, pp. 13-16.

In the Petition, the question itself states the basic issue of applicability of the Act:

---

[1] *Baltimore and Ohio Railroad Company* v. *Jackson*, 233 F.2d 660, 664 (D.C. Cir. 1956)

> "Appellant also argues that the motor track car in question is not covered by the act's § 1 requirement for air brakes and a train brake system (brakes on all cars which can be controlled from locomotive) because the car is not used to haul *standard railroad cars* and is, therefore, not a locomotive.
>
> "We find nothing in the authorities cited by appellant which leads to a conclusion that a vehicle is a 'locomotive' only if it is actually used to haul standard railroad cars."

> "In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks"? (Pet. 2)

The first sentence of the Statement in the Petition is as follows:

> "This case presents the single important question whether or not the Safety Appliance Act applies to the four-wheel motor track cars and push trucks." (Pet. 3)

Presumably, petitioner can make its argument in any order which it chooses, with the emphasis anywhere it decides to place it, and can marshal every legal contention available to it in support of this proposition that the instruction incorrectly applies the Safety Appliance Act.

Respondent's contention would be without substance even if the Section 6 argument were the only argument previously made or if the question had been limited to the applicability of Section 6. Rule 23(1)(c) of the Rules of this Court provides in part:

> "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the question set forth in the petition or fairly comprised therein will be considered by the court."

The argument that the vehicles involved here were never within the scope of the Act in the first instance is not only "fairly comprised" within the question presented, but it is logically antecedent to the problem of the applicability of the Section 6 exemption. If a motor track car is not a "locomotive" nor a push truck a "car," the question of their exemption from the Act can never be reached. Only if it is decided

that Congress intended these vehicles to be within the scope of the Act can the question of their exemption under Section 6 arise.

II.

UNPRECEDENTED USE OF THE VEHICLES

Respondent's contention that motor track cars are not customarily used to haul push trucks, made first in its Brief in Opposition to Certiorari, has now been qualified by addition of the phrase "on any other railroad." This wholly unrealistic argument has been treated with possibly more attention than it deserves in Petitioner's Reply to the Brief in Opposition to granting the writ.

III.

ADMINISTRATIVE INTERPRETATION BY THE COMMISSION

The Commission's consistent interpretation of the Act with regard to motor track cars and push trucks has not deviated in sixty-three years. That position is uncontradicted on the record (R. 90-91) and is clearly and unequivocally stated by the Commission itself in both of its briefs filed in this case. Respondent now states that despite a hesitancy "to question the sincerity of the Interstate Commerce Commission in its position here" he is "astounded by the inconsistency of this position with its own action and holding in a *comparable* situation." [Italics added]. Respondents' Brief at 22-23. The reason given for his astonishment is a part of a paragraph taken out of context from the Commission's opinion in *Ex Parte No. 179*, 297 I.C.C. 177.

Even a cursory reading of *Ex Parte No. 179*, shows that it dealt *only* with multiple-unit equipment, the

large electric-powered *regular passenger cars* operated in trains by the Long Island Railroad, the Hudson & Manhattan, and other interurban lines. These units are no more related to motor *track* cars than an old-fashioned steam locomotive is. Throughout the entire proceeding in *Ex Parte No. 179* there was no mention of or reference to either motor track cars or push trucks. Nor was consideration given to any type of railroad equipment other than multiple-unit equipment used in trains for the regular carriage of passengers and freight. While the language quoted out of context by Respondent may seem at first blush to support his contention, a reading of all of the pertinent section of the opinion, 297 I.C.C. 187-193, demonstrates its irrelevance. For the convenience of the Court, this section of the opinion is printed in its entirety as an Appendix to this Reply Brief.

Also with regard to the Commission's interpretation of the Act, Respondent appears to be making the argument that, since the Commission has refused to act in the regulation of motor track cars and push trucks, the states are free to regulate in this area until the Commission does. No rational argument is offered to support this conclusion. It would seem that none could be offered after the clear pronouncement of this Court that Congress had occupied the entire field of locomotive regulation in the Boiler [Locomotive] Inspection Act, *Napier* v. *Atlantic Coast Line R. Co.*, 272 U.S. 605, and the later statement of this Court in *Gilvary* v. *Cuyahoga Valley R. Co.*, 292 U.S. 57, 60:

> "The Safety Appliance Acts govern common carriers by railroad engaged in interstate commerce. . . . *So far as the safety equipment of such vehicles is concerned, these Acts operate to exclude state*

regulation whether consistent, complementary, additional or otherwise." [Italics added]

The import of this passage is unmistakable. If motor track cars and push trucks are vehicles to which the Act applies, all of the extensive state regulation of these vehicles must fall.

Respectfully submitted,

STEPHEN AILES
LAIDLER B. MACKALL
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel

March 27, 1957

APPENDIX

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 179[1]

RULES AND INSTRUCTIONS FOR INSPECTION AND TESTING OF MULTIPLE UNIT EQUIPMENT

NEW YORK CENTRAL RAILROAD COMPANY
LONG ISLAND RAILROAD COMPANY (William Wyer, Trustee)
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
BALTIMORE AND OHIO RAILROAD COMPANY
(STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY)
ILLINOIS CENTRAL RAILROAD COMPANY
NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
PENNSYLVANIA RAILROAD COMPANY
READING COMPANY

Decided October 25, 1955

. . . . . .

Consideration will next be given to the petition of the Hudson & Manhattan Railroad Company. This petitioner argues that the provisions of the Locomotive Inspection Act, as amended, do not apply to multiple-unit equipment so that the Commission is without authority for the prescription of the rules under consideration and that the order of October 23, 1953, redefining a locomotive so as to include multiple-unit equipment is invalid and not promulgated and issued pursuant to the provisions of section 4 of the Administrative Procedure Act. It contends that its equipment does not fall within the definition of a locomotive and that Congress, in fact, did not intend to confer on the Commission jurisdiction and authority to determine rules and instructions for the inspection and testing

[1] This report embraces also Ex Parte No. 179, petition for reconsideration of the Hudson & Manhattan Railroad Company (Herman T. Stichman, trustee).

of motorcars and electrically operated units designed to carry passengers and operated by a single set of controls. Aside from the question of jurisdiction, petitioner argues that such order of October 23, 1953, was invalid since it was issued without notice and opportunity for hearing as required by the Administrative Procedure Act.

In its exceptions to the examiner's reports, this carrier questions the propriety of the examiner's reference to the authority for the prescription of these rules as the Locomotive Inspection Act, it being its contention that the proper designation should be the "Boiler Inspection Act." As originally approved on February 17, 1911, the act in question was enacted as the Boiler Inspection Act (section 22, title 45 of the United States Code Annotated) since it established a general safety standard for locomotive boilers only. Thereafter, on March 4, 1915, the original act was amended to include not only the boiler, but also the locomotive and tender, and all parts and appurtenances thereof. Later, by the amendment of April 22, 1940, the title of chief inspector and assistant chief inspector of locomotive boilers was changed to director and assistant director of locomotive inspection. These changes indicated that the nomenclature "Boiler Inspection Act" was too restrictive, and the broader term "Locomotive Inspection Act" was applied and is the popular name by which this act is known. The Commission's annual reports refer to this act as the Locomotive Inspection Act. Acts supplementary to the Interstate Commerce Act, as well as pamphlets prepared by the Commission, designate the act in question as the Locomotive Inspection Act. It is of some significance that this petitioner in its petition for reconsideration also referred to this act as the Locomotive Inspection Act, and it was not until it filed its exceptions to the examiner's reports that it raised the question of improper reference thereto. Under the circumstances, it does not appear that this petitioner was prejudiced or otherwise misled as to the authority under which these rules and instructions

for inspection and testing of multiple-unit equipment were prescribed. Hereinafter reference to the Locomotive Inspection Act will include the Boiler Inspection Act.

For a better understanding of the jurisdictional and procedural issues involved, a recitation of the events leading up to the inception of this proceeding is advisable. On March 5, 1941, an order entitled "Proposed Rule Making" was entered in response to a complaint and petition filed by the Brotherhood of Locomotive Engineers on December 7, 1950, and a petition filed by the Brotherhood of Locomotive Firemen and Enginemen on January 24, 1951. The Hudson & Manhattan filed a motion on January 22, 1951, for dismissal of the complaint on the ground that the Commission lacked jurisdiction under the Locomotive Inspection Act over the equipment operated by it and on the further ground that petitioner was exempt from the provisions of the act because of its exempt status, contending it fell within the exemption as a street, suburban, interurban electric railway not operated as a part of a general railroad system of transportation. The order of March 5, 1951, specifically provided that all class I railroads subject to the Interstate Commerce Act were respondents, and each was served with a copy thereof. Notice to the general public was made by depositing a copy with the secretary of the Commission and by filing a copy with the Director, Division of the Federal Register. Petitioner's motion for dismissal of the above complaint was denied without prejudice to its subsequent renewal.

Thereafter the Commission prepared and circulated certain proposed rules and instructions to the respondents and labor organizations inviting their comments. These rules specifically provided that they shall apply to electrically operated units designed to carry freight and/or passenger traffic in multiple-unit service operated by a single set of controls, which were defined as (1) unit or units with propelling motors, control apparatus, and one or more con-

trol stands; (2) unit or units with propelling motors and control apparatus but without control stands; and (3) unit or units without propelling motor or control apparatus but with control stands. The rules further defined multiple-unit service as the use of two or more of the above-described units coupled and with their propulsion equipment operated from a single control position. Following the issuance of the proposed rules and instructions, a prehearing conference was held on May 26, 1952, at which time the various rules and instructions were discussed and offers made for amendments or modifications thereof.

Subsequent to the prehearing conference and after considering the suggestions, amendments, and modifications offered at such conference, a notice of proposed rulemaking was issued on October 23, 1953, the purpose of which was to advise all common carriers by railroad subject to the Interstate Commerce Act and each national organization of railroad employees, as well as the public, that an investigation would be conducted under authority of the Locomotive Inspection Act, as amended, for a determination as to what rules and instructions should be prescribed for the inspection and testing of multiple-unit equipment. Not only did the notice specifically state the type of equipment to which the proposed rules were to apply, but attached to the notice were the tentatively proposed rules and instructions containing, among others, the following rule:

> 400. All rules and instructions contained herein apply to electrically operated units designed to carry freight and/or passenger traffic operated by a single set of controls which are defined thus:
>
> 1. Unit or units with propelling motors, control apparatus and one or more control stands;
>
> 2. Unit or units with propelling motors and control apparatus but without control stands;
>
> 3. Unit or units without propelling motors or control apparatus but with control stands.

This notice of proposed rulemaking was issued in full compliance with the provisions of the Administrative Procedure Act. The notice and proposed rules and instructions were published in the November 13, 1953, issue of the Federal Register, volume 18, page 7201.

At the time of the issuance of the notice of proposed rulemaking there was in effect an order of December 14, 1925, wherein the Commission prescribed rules and instructions for the inspection and testing of locomotives other than steam. Contained therein were definitions of a locomotive and a motorcar, the former being defined as "a self-propelled unit of equipment designed solely for moving equipment" and the latter was defined as "a self-propelled unit of equipment designed to carry freight or passenger traffic and is not to be considered a locomotive." Since the purpose of the proceeding herein is to prescribe rules and instructions similar to those prescribed by the order of December 14, 1925, except that they are to apply to multiple-unit equipment instead of locomotives other than steam, it was necessary to revise the definition of a locomotive to include multiple-unit equipment. Accordingly, an order was entered on October 23, 1953, concurrently with a notice of proposed rulemaking which amended the order of December 14, 1925, insofar as here pertinent, by changing the definition of a locomotive therein to read as follows:

> A locomotive is a self-propelled unit of equipment designed for moving other equipment and includes a self-propelled unit designed to carry freight and/or passenger traffic.

Following the issuance of the above order on October 23, 1953, the Hudson & Manhattan filed a petition dated December 21, 1953, for reconsideration and vacation of such order, renewing its objection to the jurisdiction of the Commission over its equipment and reserving its jurisdictional objection, based on its status as an exempt carrier.

This petition was denied by the report and order of May 18, 1954.

Subsequent to the issuance of the report and order of May 18, 1954, to which the Hudson & Manhattan directed its petition for reconsideration filed July 28, 1954, resulting in the reopening of this proceeding for further hearing, the contention that it was exempt as an interurban electric railway was no longer mentioned by petitioner in its pleadings or on brief. It is significant also to note that prior to the institution of the further hearing, this petitioner's creditors filed an involuntary petition in the United States District Court for the Southern District of New York against petitioner under chapter X of the Bankruptcy Act. This chapter, providing for corporate reorganization, excludes from its scope a railroad corporation authorized to file a petition under section 77 of the same act. In support of its motion to dismiss the above involuntary petition for lack of jurisdiction, petitioner's president and chairman of the board of directors filed an affidavit dated September 24, 1954, in which he stated that petitioner is a common carrier by railroad engaged in the transportation of persons in interstate commerce and that it does not come within the interurban electric railway exception but that if it does, it is nevertheless a part of a general railroad system of transporation operated by The Pennsylvania Railroad Company. Subsequent to the further hearing in the instant proceeding, it has come to the Commission's attention that petitioner's motion to dismiss the chapter X reorganization proceeding was denied by the United States District Court and it declined to permit the reorganization proceeding to proceed under section 77. (126 F. Supp. 359.) In this respect, attention is called to the fact that the ruling of the court that petitioner is not an interurban electric railway not operated as a part of a general railroad system of transportation was only for the purpose or reorganization, and there was no hold-

ing that it was exempt from the provisions of the Locomotive Inspection Act.

As previously stated, the petition for reconsideration of the Hudson & Manhattan which gave rise to the reopening of this proceeding for further hearing presents two jurisdictional or procedural propositions. First, that the provisions of the Locomotive Inspection Act, as amended, do not apply to multiple-unit equipment of the type operated by petitioner and, second, that the steps taken in changing the definition of a locomotive by the order of October 23, 1953, were not in compliance with the Administrative Procedure Act.

Consideration will first be given to the propositions in the order presented. It is petitioner's contention that its multiple units are not locomotives and in support thereof refers to the history of the Locomotive Inspection Act, urging that it was not the intent of Congress to include such equipment within the provisions of the act. Particular reference is made to the amendment of June 7, 1924.

There is no dispute over the fact that the original Locomotive Inspection Act applied to locomotives propelled by steam power since section 2 thereof specifically stated that it applied to any locomotive "engine propelled by steam power in moving interstate or foreign traffic." The amendment of March 4, 1915, likewise applied to steam locomotives but the application of the act was extended to include the entire locomotive and tender and all parts and appurtenances thereof. The amendment of June 7, 1924, not only provided for increases in the number and salaries of inspectors but, in addition, removed the restriction of its application to locomotives propelled by steam power and made the law apply to all locomotives regardless of the power by which they are propelled. By these amendments Congress neither specifically included nor excluded multiple-unit equipment, and its intent in this respect must be gathered from the language used in the act

and a comparison made of it with other laws on the same subject. The language in the act is all-inclusive, and considering its purpose, which is to promote the safety of employees and travelers upon railroads, the words "any locomotive" as used in section 2 must be construed as intended to encompass all of the motive equipment of any carrier subject to the act. The broad purpose of the Locomotive Inspection Act has been stated in a number of cases, including *Lilly* v. *Grand Trunk W. R. Co.*, 317 U.S. 481, 486, where the Court said:

> The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment.

Under authority of section 25 of the Interstate Commerce Act, rules, standards, and instructions for the installation, inspection, maintenance, and repair of automatic block-signal systems, interlocking, traffic control systems, automatic train stop, train control, and cab signal systems and other similar appliances, methods, and systems, were prescribed in Ex Parte No. 171 (278 I.C.C. 267, 307). In that proceeding which also deals with the promotion of safety of employees and travelers upon railroads, a locomotive is defined as a self-propelled unit of equipment which can be used in train service. The rules and instructions provided therein, which clearly include multiple-unit equipment, have been consistently applied to this petitioner and it readily admits it has never questioned their applicability.

Another reason advanced by petitioner that its multiple units are not locomotives is their dissimilarity from locomotives. It takes the position that locomotives are self-propelled units of equipment designed solely for moving other equipment which may be powered by a diesel engine, by electricity, steam, or other means, whereas its multiple units which are powered by electricity from a third rail

have the appearance of an ordinary railroad car and usually have all the accommodations found in a passenger railroad car. Appearance clearly cannot determine the classification into which this type of equipment should be placed. Although petitioner's equipment has accommodation for passengers, it nevertheless is a self-propelled unit of equipment capable of moving other equipment. The definition of a locomotive submitted by petitioner in this respect is essentially the same as the Commission's definition in "Classification of Train-Miles, Locomotive-Miles and Car-Miles for Steam Roads." The definition of a locomotive as contained in such classification is only for accounting and other reporting requirements, and a definition as used for such purposes cannot be construed as also applicable to issues for determination under the Locomotive Inspection Act involving entirely unrelated matters.

For the foregoing reasons, it must be concluded that petitioner's multiple-unit equipment is included within the definition of a locomotive and is subject to the jurisdiction of the Commission under the Locomotive Inspection Act. Petitioner's motion in this respect is, therefore, denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 370.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MILFORD J. MEYER,
11 N. Juniper St.,
Philadelphia 7, Pa.,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN
& POUL,
Of Counsel.

INDEX

	PAGE
Question Presented	1
Statement	1
Opinion of the Court Below	2
Reasons for Refusing the Writ	3
Conclusion	7

TABLE OF CITATIONS

CASES:

Chicago R. I. & G. Ry. v. Bernnard (Tex.), 275 S. W. 505	3, 4
Coray v. Southern Pac. Co., 335 U. S. 520	7
Dougall v. Spokane, P. & S. Ry. Co. (C. A. 9), 207 F. 2d 843, cert. den. 347 U. S. 904	3, 4
Hoffman v. New York, N. H. & H. R. Co., 74 F. 2d 227, cert. den. 294 U. S. 715	3, 4, 5
Illinois Central R. R. v. Williams, 242 U. S. 462	5
Martin v. Johnston (Fla.), 79 So. 2d 419	3
Shields v. Atlantic Coast Line, 350 U. S. 318	5
Southern Pacific Co. v. Carson (C. A. 9), 169 F. 2d 734	5, 6
Spokane & E. I. R. Co. v. United States, 241 U. S. 344	3, 4
United States v. Atchinson, T. & S. F. Ry. Co., 156 F. 2d 457	6
United States v. Fort Worth and Denver City Ry. Co., 21 F. Supp. 916	5

AUTHORITIES:

Supreme Court Practice (2d Ed.), Stern & Grossman 110	4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 370.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

QUESTION PRESENTED.

Restated upon the facts established by the record in this case, the question presented is:

> "Where a four-wheeled gasoline motor car is used to pull a four-wheeled truck in order to move men and equipment on a railroad, are these vehicles exempted from the provisions of the Safety Appliance Acts?"

STATEMENT.

Petitioners "Statement" must be supplemented to make it absolutely clear that there is **not a word of evidence in this record that railroad motor cars are usually, customarily or ever used to pull loaded trucks.** Evidence was admitted by agreement to prove that the railroads use many motor cars and many trucks which are "capable of being towed by motor cars" (R. 78a). But there is no admission and no proof whatsoever that they **are** so used.

Similarly, it was conceded that the Interstate Commerce Commission had never adopted standards for these vehicles or interpreted the Acts to apply to them—**but** there is not a word of evidence in the record that the Commission ever knew that motor cars were usually, customarily or **ever** used to haul loaded trucks in order to move men and equipment.

Contrary to petitioner's statement, there is no word of evidence in this record showing any necessity for such hauling.

The very order of the Commission upon which petitioner places reliance clearly demonstrates the fallacy of its position. The Court of Appeals (App. 11) has pointed out that the **actual use** of the equipment controls over its name.

OPINION OF THE COURT BELOW.

(223 F. 2d 660.)

The Court of Appeals has here held clearly and without cavil that when a four-wheel motor car is used to pull a four-wheel truck in order to haul men and equipment on a railroad, both vehicles are subject to the provisions of the

Safety Appliance Acts. In this holding, its decision conforms to every prior decision of this Court and every appellate court in the country—**there are no exceptions, there is no opinion to the contrary.**

REASONS FOR REFUSING THE WRIT.

I.

The decision below is in complete conformity with the decisions of this Court and every appellate court in the country which has ever considered a case involving the Section 6 exemption.

Hoffman v. New York, N. H. & H. R. Co. (C. A. 2), 74 F. 2d 227, cert. den. 294 U. S. 715;
Spokane & E. I. R. Co. v. United States, 241 U. S. 344;
Martin v. Johnston (Fla.), 79 So. 2d 419;
Chicago R. I. & G. Ry. v. Bernnard (Tex.), 275 S. W. 505;
Dougall v. Spokane, P. & S. Ry. Co. (C. A. 9), 207 F. 2d 843, cert. den. 347 U. S. 904.

No appellate court in the land has ever excluded a four-wheeled vehicle from the protection of the Act. On the contrary, in the **Hoffman** case this Court refused to review a decision of the Second Circuit which specifically held that the Section 6 exemption did not apply to a gasoline tractor pulling a hand car (both four-wheeled vehicles). In the **Spokane** case this Court, in passing on the kindred Section 8 exemption, specifically stated (241 U. S. 350) that the Section 6 exemption applied only to logging cars. In the **Martin** case the Supreme Court of Florida was urged to apply the exemption to just such a motor car as was here

in use; it did not deem this argument to have sufficient merit even to warrant discussion. The **Bernnard** case was decided on a matter of pleading but it squarely supports the applicability of the Act to this type of vehicle. In the **Dougall** case, the Court assumed the applicability of the Act to motor cars.

Petitioner attempts to make a showing of conflict upon the fact that the Second Circuit, in the **Hoffman** case, concluded that the Section 6 exemption is limited to logging cars (as, in fact, did this Court in the **Spokane** case) while the Court below concluded that the exemption should be restricted to coal cars. It is pure sophistry to argue that this constitutes a conflict among the Circuits on the question here involved. **Neither Circuit and no other appellate court has ever held that the exemption is applicable to the vehicles here involved.** The most that can be said for petitioner's argument is that it may raise a question to be decided when a case arises which **does** involve a logging car or a coal car.

Students of this Court's policy have said, in discussing conflicting decisions below as ground for allowance of certiorari:

> "This means that there must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized."
>
> *Supreme Court Practice*, Stern & Grossman (2nd Ed.), page 110.

II.

The decision below does not affect any administrative interpretation of the Act.

The Interstate Commerce Commission, so far as this record discloses, has never been faced with a problem involving the use of a motor car to pull hand cars in order

to move men and equipment. So far as this record discloses, such a use has never been made of these vehicles before. In adopting standards for "locomotives", the Commission order of 1925 distinguished "for the purposes of this order" motor cars from locomotives **BUT** it made clear that "for the purposes of this order" a motor car is supposed to **carry** freight and passengers while a locomotive is supposed to **move other equipment.** As the Court below aptly stated (App. 11):

> "In the present case the motor track car was being used to haul another car, i. e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name."

The Court below again notes with approval the **Hoffman** case which held a gasoline tractor to be a locomotive when used to haul a hand car and the case of

United States v. Fort Worth and Denver City Ry. Co., 21 F. Supp. 916,

which held that a crane was a locomotive when used to haul other cars.

Even were the Commission's actions meaningful, they would not control the courts in the administration of the Act:

Shields v. Atlantic Coast Line, 350 U. S. 318;
Illinois Central R. R. v. Williams, 242 U. S. 462;
Southern Pacific Co. v. Carson (C. A. 9), 169 F. 2d 734.

In the **Shields** case, this Court recently held that the dome running board on a tank car was within the Safety Appliance Act even though not prescribed by the Commission. In the **Williams** case, this Court early rejected the argument that the Act required implementation by the

Commission before being effective. In the **Carson** case, the Ninth Circuit held that a "brake club" was a part of the hand-brake even though not prescribed by the Commission.

Nowhere in the decided cases can there be found any reason for the bewilderment expressed by petitioner as to the applicability of the Act. The rulings of the Courts are consistent and clear: a railroad vehicle used to haul another vehicle is a locomotive; a car is a car; when safety appliances are necessary for the protection of employees on such vehicles, they must be used. As the Ninth Circuit has said in

> *United States v. Atchinson, T. & S. F. Ry. Co.*, 156 F. 2d 457, 458-459:
>
> "We are not disposed to countenance the interpolation of exceptions not contained in the Safety Appliance Acts. That is the business of Congress. Aside from their lack of authority in the premises, the courts should not be moved by considerations of convenience or practicability to whittle away and eventually nullify the protection afforded by this beneficent legislation."

III.

There is no showing on this record that a novel, important and essential question should be reviewed.

The use and necessity of motor cars and trucks on the railroads may be conceded. That it is necessary to use motor cars to haul trucks is **not conceded, has not been proved** and **is not supported by a single word of evidence in this record.**

If it follows, as petitioner claims, that the railroads will have to equip vehicles with safety devices to protect their employees who are required to ride on such vehicles, they will be required only to serve the precise purposes of the Act and no more. A man can be maimed or killed as easily

on a motor car or a truck as he can on a locomotive or freight car. Had it been a truck which had come uncoupled from a motor car, the decedent would have been just as dead as he was in.

Coray v. Southern Pac. Co., 335 U. S. 520.

CONCLUSION.

The petition in the instant case presents no possible ground for review:

1. There is absolutely no conflict among the decisions of this Court or the Courts below; every appellate decision in our books sustains the judgment;

2. There is absolutely no administrative ruling or policy affected by this decision and, even if there had been one, the oft-repeated policy of the law would require the decision below;

3. There is no issue here involved of great, novel or practical importance to anyone except the seventy-one year old respondent who has not as yet received a penny of compensation for injuries which he suffered almost five years ago.

For these reasons it is prayed that the petition for certiorari be dismissed.

Respectfully submitted,

MILFORD J. MEYER,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN & POUL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 370.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

DANIEL T. JACKSON,
Respondent.

BRIEF IN REPLY TO AMICUS CURIAE BRIEF OF INTERSTATE COMMERCE COMMISSION.

MILFORD J. MEYER,
11 N. Juniper St.,
Philadelphia 7, Pa.,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN
& POUL,
Of Counsel.

IN THE

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BRIEF IN REPLY TO AMICUS CURIAE BRIEF OF INTERSTATE COMMERCE COMMISSION.

This is a private litigation involving only the railroad and its 72 year old employe. It involves none of the great principles and can trigger none of the dire consequences contended for by the petitioner and now reiterated by the Interstate Commerce Commission.

We have pointed out in our Brief in Opposition that there is not a word of evidence in this record to support a finding that railroad motor cars are usually, customarily, or ever used to pull loaded trucks on any other railroad. It is significant that the Commission itself does not advise this Court that it ever had any knowledge of the fact that petitioner or any other railroad was using motor cars to

pull loaded trucks on its lines. In this litigation, therefore, it is not pertinent to decide whether or not the Commission has been derelict in failing to adopt regulations or to prescribe standards for motor cars or trucks operated independently of each other.

Had it been known to the Commission that the lives and limbs of employes would be placed in danger by the use of combinations of vehicles such as these, it seems quite certain that requirements for adequate braking equipment would have been adopted. The Commission has adopted just such regulations with regards to multiple motor vehicles used on highways: 49 CFR 194.5 (1949); 49 CFR 193.40 et seq. (1956).

An argument, similar to that here made, was presented by the railroad in its petition for rehearing of *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U. S. 384, reh. den. 338 U. S. 945. Its contention, that the Commission's interpretation of the statute was controlling, was rejected by this Court.

The Commission filed a brief in support of the railroad in *Shields v. Atlantic Coast Line R. Co.*, 350 U. S. 318, which involved the interpretation of another section of the Safety Appliance Act. There, as here, no regulation or standard adopted by the Commission was applicable. This Court held, nevertheless, that "it does not follow that appliances necessary and furnished for the safe use of the car, although not standardized under §3, are not within the sweep of §2."

The petition presents no ground for review and should be dismissed.

Respectfully submitted,

MILFORD J. MEYER,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN & POUL,
Of Counsel.

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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DANIEL T. JACKSON,
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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief for the Respondent

MILFORD J. MEYER,
11 N. Juniper Street,
Philadelphia 7, Pa.,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN
& POUL,
Of Counsel.

INDEX

	PAGE
Questions Presented	1
Statutes Involved	2
Counter-Statement of the Case	2
Summary of Argument	4
Argument	5
I. The Writ should be dismissed as having been improvidently granted	5
II. The Safety Appliance Acts are applicable to the vehicles here involved	8
A. The meaning of the words used requires coverage	9
B. Liberal construction in the light of the purpose of the Acts requires coverage	12
C. Every Appellate Court decision confirms coverage	16
III. Administrative interpretation is not the guidepost to construction	19
A. The argument is based upon fundamental fallacies	19
B. The Commission's Argument is destroyed by its own decision	22
C. Petitioner is not supported by the Commission's failure to act, existence of state regulations, or the failure of Congress to amend the Acts	25
D. There are no practical considerations that support petitioner's argument	28

PAGE

IV. The Section 6 proviso does not exempt these vehicles 30

A. Grammatical meaning of the proviso 30

B. The proviso must be strictly construed 31

C. Every Appellate Court decision has so held . . 32

D. Legislative history supports the court below 33

E. There is no exemption under Section 23 34

Conclusion 36

TABLE OF CASES CITED

Addison v. Holly Hill Fruit Products, 322 U. S. 607 9
Arnold v. United States, 147 U. S. 494 31

Banta v. Union Pac. R. Co., 242 S. W. 2d 34 36
Benson v. Railway Company, 75 Minn. 163 11
Boyd v. Missouri Pac. Ry. Co., 155 S. W. 13, 249 Mo. 110 11
Brady v. Terminal R. Assn., 303 U. S. 10 14
Brown v. Maryland, 12 Wheaton 419 31

Chicago, M. & St. P. Ry. Co. v. Voelker, 129 F. 522 . . . 13
Chicago, R. I. & G. Ry. v. Bernnard, 275 S. W. 505 . . . 18, 33
Coray v. Southern Pacific Co., 335 U. S. 520 13

Davis v. Manry, 266 U. S. 401 29
Donnell v. United States, 229 F. 2d 560 9
Dougall v. Spokane, P. & S. Ry. Co., 207 F. 2d 843, cert. den. 347 U. S. 904 . . . . . 18, 33

Edgington v. Southern Pacific Co., 55 P. 2d 253 35
Ex Parte No. 179, 297 I. C. C. 177 . . . . . 8, 22, 23

Hoffman v. N. Y., N. H. & H. R. Co., 74 F. 2d 277, cert. den. 294 U. S. 715 . . . . . 7, 17, 19, 21, 32, 34

PAGE

Illinois Cent. R. R. v. Williams, 242 U. S. 462 25

Johnson v. Southern Pacific Co., 196 U. S. 1, reversing 117 F. 462 ..... 9, 11, 18, 28

Kansas City etc. Railroad Co. v. Crocker, 95 Ala. 412, 11 So. 262 10

Lilly v. Grand Trunk W. R. Co., 317 U. S. 481 13

Martin v. Johnston, 79 So. 2d 419, cert. den. 350 U. S. 835 ..... 7, 15, 17, 33

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 ..... 26, 27

O'Donnell v. Elgin, J. & E. R. Co., 338 U. S. 384 ..... 13, 15, 26

Penna. R. Co. v. Pub. Service Com., 250 U. S. 566 26

Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563 12

Rayonier, Inc. v. United States, —— U. S. ——, 1 L. Ed. 2d 354 ..... 9, 31

Schlemmer v. Buffalo & R. P. Co., 205 U. S. 1 11

Seery v. Gulf, C. & S. F. Ry. Co., 77 S. W. 950 11

Shields v. Atlantic Coast Line, 350 U. S. 318 ..... 25, 26

Southern Pacific Co. v. Carson, 169 F. 2d 734 25

Southern Ry. Co. v. Crockett, 234 U. S. 725 29

Spokane & Inland R. R. v. Campbell, 241 U. S. 497 ..... 11, 28

Spokane & Inland R. R. v. United States, 241 U. S. 344 ..... 28, 32

Terminal Assn. v. Trainmen, 318 U. S. 1 27

Texas & P. Ry. Co. v. Hervey, 89 S. W. 1095 11

Texas & P. Ry. Co. v. Webb, 72 S. W. 1044 11

Thomas v. Georgia Railroad & Banking Company, 38 Ga. 222 11

United States v. Atchinson, T. & S. F. Ry. Co., 156 F. 2d 457 32

PAGE

United States v. Dickson, 15 Peters 141 31
United States v. Fort Worth & Denver City Ry. Co., 21 F. Supp. 916 19
United States v. Northern Pacific Ry. Co., 121 F. Supp. 397 25
United States v. Southern Pac. Co., 60 F. 2d 864..... 25
Urie v. Thompson, 337 U. S. 163 14

TABLE OF STATUTES CITED

45 U. S. C. 1 ..... 4, 8, 14, 15
45 U. S. C. 2 ..... 4, 13, 17
45 U. S. C. 6 ..... 4, 5, 6, 17, 30, 33, 34, 35, 36
45 U. S. C. 8 ..... 4, 8
45 U. S. C. 11 ..... 4, 14, 15, 17, 29
45 U. S. C. 23 ..... 4, 8, 24, 34, 35, 36
45 U. S. C. 51 etc. 14

MISCELLANEOUS

24 Congressional Record 1477 24
28 Congressional Record 3129 34
Interstate Commerce Commission:
Accident Bulletin No. 124 (1955) 16
Order of December 14, 1925 ..... 21, 23, 27
Order of October 23, 1953 ..... 23, 27
Webster's New International Dictionary (2d Ed.)..... 9

APPENDIX:
A. Text of Statutes Involved 1a

IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief for the Respondent

QUESTIONS PRESENTED.

The primary question **now** presented to this Court by the petitioner, and the sole question discussed by the amicus curiae is **not** the question upon which certiorari was requested, nor the question presented to the Court below. Petitioner's argument to the Court below presented the single question as to whether or not the Section 6 exemption applied. Its Petition for Certiorari presented **only**

this same question. In its brief before this Court, this question has now been relegated to a secondary position and its principal argument now is that the cars here involved are not "cars" within the scope of the Safety Appliance Acts. This, furthermore, is the sole position taken by the Commission in its brief.

As now presented, if this Court will consider the new issue raised, the questions are:

1. When a track motor car is used to haul a push truck on a railroad, are they "vehicles" within the meaning of the Safety Appliance Acts?

2. Are a motor car carrying men and a push truck carrying equipment exempted from the requirements of the Acts by the proviso of Section 6?

STATUTES INVOLVED.

The full texts of Sections 1, 2, 6, 8, 11 and 23 (Safety Appliance Acts and Boiler Inspection Act) are printed in Appendix A to this Brief.

COUNTER-STATEMENT OF THE CASE.

Respondent, now 71 years of age, had been in the employ of the petitioner for 46 years. For 39 years he had been a section foreman of track maintenance and had been operating motor cars for 34 years (R. 21). He was responsible for the maintenance and repair of a section of defendant's track between Waring and Deerwood, Maryland. Under his supervision were a crew of men and a variety of equipment, e. g. bars, wrenches, track wrenches, hammers, shovels, etc., including a motor car and truck.

On November 1, 1951, respondent and his crew had been ordered by his supervisor to take a load of coal to the station-master at Washington Grove and to work a section of the westbound track approximately 390 feet from the Station. At "quitting time" the crew loaded the truck with tools and equipment to return to Gaithersburg where the motor car and truck and other equipment were stored pursuant to instructions from their supervisor and in compliance with the rules and regulations of the petitioner.

The motor car was a Mudge belt-drive engine, powered with a gasoline motor, equipped with a hand-brake operating on iron brake shoes. The loaded truck which it was to pull weighed about half a ton and was not equipped with any brakes at all (R. 23). The motor car had no brakes which could control the truck which it was pulling (R. 23).

Respondent and his crew pushed the motor car and truck onto the west-bound tracks, started the engine and climbed aboard for the return trip. From a standing start they traveled "about 195 feet" to the point where the vehicles overturned (R. 26, 31). They were traveling "around about 5 to 10 miles an hour" (R. 32) when a dog ran across the tracks from the station on respondent's left. When respondent first saw the dog running, it was at about the first rail of the east-bound track (R. 27, 51). Respondent "grabbed the brake back with everything (he) had" (R. 27). The brakes on the motor car applied and the car and truck skidded about 39 feet before it struck the dog and derailed (R. 28) throwing the respondent into a ditch and causing his injuries. Respondent's uncontradicted evidence was that the motor car (without the truck) could have been stopped under the same conditions within 6 to 8 feet (R. 32) but that he was unable to stop the car and truck before it had gone 39 feet and overturned (R. 28).

Petitioner did not produce a single qualified motor car operator to contest respondent's testimony. It did produce evidence that the motor car here involved is substantially the same as the type customarily used in the industry and

that approximately sixty thousand are in use (R. 78). It also produced evidence that the truck here in use was substantially the same as the type customarily used and that these trucks "are capable of being towed" by motor cars (R. 78). Not a word of evidence, however, was produced to prove that at any other time or place did any other railroad use or permit a motor car to pull a truck without brakes.

Respondent also produced an "expert" witness who admitted that the weight of a following vehicle which had no brakes would lengthen the stopping distance of the motor car (R. 69, 70).

The trial, before Honorable Jennings Bailey and a jury, resulted in a verdict for the respondent in the amount of $15,000.00 upon which judgment was entered. Petitioner's argument that the vehicles involved were exempted from the requirements of the Safety Appliance Acts[1] by the proviso of Section 6[2] was rejected three times by the District Court and by the Court of Appeals in affirming the judgment. Petitioner applied for certiorari on the same issue, asserting a conflict between the decision of the court below and a prior decision of the Second Circuit. This Court granted certiorari (352 U. S. 889).

SUMMARY OF ARGUMENT.

I. The writ should be dismissed as having been improvidently granted. The question here presented is not that upon which petitioner relied in the courts below or in its Petition for Certiorari; it is a broad question which should not be determined by this Court in a private litigation.

---

[1] 45 U. S. C. 1, 2, 6, 8, 11 and 23 quoted in full in Appendix A.
[2] 45 U. S. C. 6, Appendix 1a.

II. The Safety Appliance Acts are applicable to the vehicles here involved. This conclusion must be reached whether we construe the statute by accepting the ordinary meaning of its words, consider it in the light of its purpose, or view its judicial history.

III. Administrative interpretation is not the guidepost to its construction. The argument for such construction is based upon fundamental fallacies and it is refuted by the Commission's own decision. The petitioner's position is not supported by the Commission's failure to regulate, the existence of State regulations, or the failure of Congress to amend the statute. There are no practical considerations which support the argument.

IV. The proviso of Section 6 does not exempt these vehicles. Grammatically read, there is no exemption. Strictly construed, the exemption cannot apply. The courts have unanimously so construed the section. Legislative history supports the court below. Section 23 does not contain any exemption.

ARGUMENT.

I.

The Writ Should be Dismissed as Having been Improvidently Granted.

Throughout the long history of this case, petitioner has stood upon a single point; that the proviso of Section 6 exempts the four-wheeled vehicles here involved. In support of its motion to strike twice urged upon the District

Court, and in its motion for new trial[3] this was the issue raised. In its brief on appeal to the Court of Appeals, it stated the QUESTION PRESENTED as follows:

> "1. Are four-wheel railroad motor track cars and push trucks exempt from the Safety Appliance Act, 45 U. S. C. §1 et seq., in view of the provision of 45 U. S. C. §6 which provides in part:
>
> "* * * Nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars, * * * or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."

In the same brief,[5] its STATEMENT OF POINTS reads:

> "1. Section 6, 45 U. S. C. §6, of the Safety Appliance Act excludes from the coverage of that Act four-wheel motor track cars and push trucks."

In its Petition for Certiorari, the question presented to this Court[6] was:

> "The provisions requiring the use of specific safety appliances on railroad equipment are contained in sections 1-7 of the Safety Appliance Act, 45 U. S. C. §1 et seq. Section 6 of the Act provides in part:
>
> '* * * That nothing in sections 1-7 of this title shall apply to trains composed of four-wheel cars or

---

[3] The motions and briefs are not made part of the printed record. but the Orders thereon appear at R. 13, 16.

[4] Front page.

[5] Page 12. The summary of its argument in this brief reads as follows (page 21):

> "The short of the matter is that the language of the statute excludes all four-wheel cars from its coverage; and, not only the agencies responsible for enforcing the statute, but more than half of the states have consistently interpreted it as not being applicable."

[6] Page 2.

to trains composed of eight-wheel standard logging cars, * * * or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.'

"In view of this express exemption, is the Safety Appliance Act applicable to four-wheel railroad motor track cars and push trucks?"

It there asserted the existence of a conflict between the decision of the Court below and the prior decision of the Second Circuit[7] on this point. Mature consideration of this issue will disclose that there exists no actual conflict. Every appellate court decision dealing in any way with this provision of the Act[8] is in conformity with the decision below.

In its present Brief, petitioner has relegated this question to a secondary, make-weight position and fails completely to meet the decision below.[9] Instead, it presents a new and immensely broader issue, the resolution of which will allegedly produce "serious practical problems" for the entire railroad industry.

The Interstate Commerce Commission, in its amicus curiae brief in support of the petition, did represent that important issues vital to the industry were involved in this case. These issues are no more vital today than they were twenty years ago when this Court denied certiorari in the *Hoffman* case[10] or last year when it denied certiorari in the *Martin* case,[11] both of which properly raised these issues.

Although there is little common ground upon which we stand with the petitioner in its argument here, with one point we are in complete accord.[12] This private litigation between a 71-year old employe and his employer is not the

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[7] Page 10.

[8] See page 16 of this Brief.

[9] See pages 32-34 of this Brief.

[10] **Hoffman v. New York, N. H. & H. R. Co.**, 74 F. 2d 227, cert. den. 294 U. S. 715.

[11] **Martin v. Johnston**, 79 So. 2d 419, cert. den. 350 U. S. 835.

[12] Petitioner's brief, page 35.

type of proceeding in which this Court should decide an issue so far-reaching as petitioner and the Commission would now make it out to be. In the light of all prior appellate proceedings involving these vehicles, the Commission should initiate a proceeding to standardize and regulate the equipment of maintenance of way vehicles.[13] The Writ of Certiorari in this case should be dismissed as having been improvidently granted.

II.

The Safety Appliance Acts are Applicable to the Vehicles Here Involved.

Complete discussion of the new issue now raised is necessitated by the extensive argument made and the minutely documented data gathered in both briefs. All of this is presented in order to create an impression that there is ambiguity in the statutes where none exists and to have them construed on the basis of legislative history and administrative interpretation.

The Courts below have held that where the motor car was used to pull the push truck the petitioner was required "to have brakes on the motor car controlling the brakes on both the truck and the motor car" (R. 74). The decisions below are based upon the Safety Appliance Acts which require "appliances for operating the train-brake system" on "all trains, locomotives, tenders, cars and similar vehicles"[14] and that "all parts and appurtenances" of locomotives be "in proper condition and safe to operate in the service to which the same are put".[15] Petitioner claims that these statutes should be interpreted to exclude the vehicles here involved from their terms.

---

[13] As it did in connection with electrically operated motor cars in **Ex parte No. 179, 297 I. C. C. 177**, discussed infra, page 23.

[14] 45 U. S. C. 1 and 8, Appendix 1a, 2a.

[15] 45 U. S. C. 23, Appendix 3a.

A.

The Meaning of the Words Used Requires Coverage.

Interpretation of any statute begins with the language of the statute—the ordinary and customarily accepted meaning of the words used.[16] There is no doubt (and the contrary is not here argued) that, as so construed, the Acts cover the vehicles involved in the instant case. A motor track car and a push truck are "cars" or "vehicles" as those terms are usually defined. A "car" is defined in Webster's New International Dictionary (2nd Ed., 1950) as "a vehicle adapted to the rails of a railroad." This principle of construction was early adopted in relation to these Acts soon after their passage. In *Johnson v. Southern Pac. Ry.*, 117 Fed. 462, the Circuit Court had narrowly construed the original Act so as to hold that a "locomotive" was not a "car." This Court reversed (196 U. S. 1) upon the principle here contended for, saying (196 U. S. 15-16):

> "And manifestly the word 'car' was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter and object, 'any car' meant all kinds of cars, running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act."

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[16] The prime rule of statutory construction is that its words should be given the meaning they would evoke in the common mind.

> "For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. * * * After all, the legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."
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> **Donnell v. United States**, 229 F. 2d 560, 562, quoting **Addison v. Holly Hill Fruit Products**, 322 U. S. 607, 617.
>
> Cf. **Rayonier, Inc. v. United States**, —— U. S. ——, 1 L. Ed. 2d 354, 357, 25 L. W. 4107.

Supporting this holding, this Court cited seven state court decisions. Of these, **three** specifically applied to **hand** cars. *Kansas City etc. Railroad Company v. Crocker*, 95 Ala. 412, held that a hand car, such as is in general use on railroads in maintenance of way work, came within the terms of a statute giving an action for injuries by reason of the negligence of any person who has charge of "any signal, points locomotive, engine, switch, **car**, or train upon a railway." It stated (95 Ala. 422):

> "It is not difficult to select from the several definitions of the word 'car', as found in the dictionaries, one which is applicable to the word as used in the statute. The Century Dictionary gives this, among other definitions: 'a vehicle running upon rails.' One of Webster's definitions is: 'a vehicle adapted to the rails of a railroad.' We find nothing in the language of the statute to suggest that the word as there used was intended to convey a meaning which excludes the idea of a hand or lever-car. Such cars are used in the ordinary business of railroads. Employees who ride upon them, or who are in the discharge of duties on or near to tracks over which they are propelled, are liable to be injured in consequence of the negligent handling of them. It is plain that sub-division 5 of the statute covers the case of an injury caused by reason of the negligence of a co-employee who has the charge or control of a car, though such car is at the time in no way connected with an engine, and is not a part of a train. The negligent handling of a detached passenger or freight car may cause an injury which is actionable under the statute. It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train. If the car is adapted to the rails of a railroad, and is used in the business of railroads, we think that it is none the less within the meaning of the word as used in the statute because it is made to be propelled by hand."

In *Thomas v. Georgia Railroad & Banking Company*, 38 Georgia 222, the statute created a cause of action for persons injured by a railroad "in or by the running of the cars or engines." The Court there held that an injury sustained by the running of a hand-car was within the terms of the statute.

In *Benson v. Railway Company*, 75 Minnesota 163, an employee operating a hand-car was held to be within the coverage of a statute relating to persons "operating, running, riding upon or switching passenger or freight or other trains, engines or cars."

In addition to these cases cited with approval by this Court, the courts of last resort of other States have consistently held that the word "cars", under similar circumstances, includes "hand-cars":

Boyd v. Missouri Pac. Co., 155 S. W. 13, 249 Mo. 110;

Texas & P. Ry. Co. v. Hervey, 89 S. W. (Texas) 1095;

and "push cars":

Seery v. Gulf, C. & S. F. Ry. Co., 77 S. W. 950 (Texas);

Texas & P. Ry. Co. v. Webb, 72 S. W. 1044 (Texas).

Soon after the decision in the *Johnson* case, the status of a shovel car under the Act was brought into question in *Schlemmer v. Buffalo, Rochester & E. Ry.*, 205 U. S. 1. Again this Court construed the language of the Act in its generic sence and broadened its coverage.

Petitioner's argument has been rejected by this Court with reference to the Air Brake Act. In *Spokane & Inland R. R. v. Campbell*, 241 U. S. 497, the railroad contended that an electrically operated train was not within the Act, particularly because of the use of the terms, "locomotive engine", "locomotives". It relied upon the same argument as here presented: the use of words, "locomotives", "engines", etc. and the absence of any legislative or Commis-

sion discussion of electric trains. Rejecting this construction, this Court said (241 U. S. at 507):

> "Of course, an important object of having a train equipped with a system of brakes under the single control of the engineer is to permit of a prompt and effective reduction of speed when the man driving the train is notified of danger. **The importance of this is precisely the same whatever be the motive power,** and in view of the beneficial purpose of the Act and the evident intent of Congress to enlarge its scope so far as necessary to guard against the dangers in view, the term 'similar vehicles' must be held to have the effect of bringing electric motors and trains drawn by them within the provision respecting power or train brakes." (Emphasis supplied.)

Only an extremely narrow and unrealistic interpretation of the words of the statute would exclude these vehicles from its coverage. Such an interpretation would violate every precept laid down by the Courts in construing the statute.[17]

B.

Liberal Construction in the Light of the Purpose of the Acts Requires Coverage.

Consistently in every case coming before this Court the language of the Acts have been construed broadly and liberally to effect the safety of railroad employees in whatever field they may be working. It has been aptly stated that great statutes are empty vessels into which the judges pour the wine of meaning. Equally, by inhospitality of construc-

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[17] In the case of **Railroad Commission v. Chicago, B. & Q. R. Co.**, 257 U. S. 563, 588-589, this Court declared that extraneous aids "are only admissible to solve doubt and not to create it."

tion, the Courts have the power to constrict the scope of a law's applicability so narrowly that it may become an empty container of no practical use.

In *Lilly v. Grand Trunk W. R. Co.*, 317 U. S. 481, this Court said of the Boiler Inspection Act (317 U. S. 486):

> "The Act, like the Safety Appliance Act, is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."[18]

Every attempt to obtain from this Court a narrow construction of these Acts has met with failure. A glance at some of these decisions is illuminating.

In *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U. S. 384, this Court was asked to review a decision holding that the breaking of a coupling did not constitute a violation of the Coupler Act, (45 U. S. C. 2)[19] which, by its terms, required *only* couplers which coupled automatically by impact and could be uncoupled without requiring men to go between the ends of the cars. Rejecting this narrow construction and reversing the court below, this Court said (338 U. S. at 388-389):

> "The Act so construed would guard against dangers incident to effecting an engagement or disengagement while ignoring the even greater hazards which can result from the failure of a coupling to perform its main function, which is to stay coupled until released."

In *Coray v. Southern Pacific Co.*, 335 U. S. 520, the court below had held that a leak in the brake line of a train which caused it to stop did not constitute a violation of the Air

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[18] Typical of many similar statements is that made by the Eighth Circuit in **Chicago M. & St. P. Ry. Co. v. Voelker**, 129 Fed. 522:

> "Obviously the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy."

[19] Appendix A, page 1a.

Brake Act (45 U. S. C. 1)[20] because the object of the Act was to protect employees from the dangers of moving and not standing trains. Again rejecting this narrow construction and reversing the court below, this Court said (335 U. S. at 522):

> "We do not view the Act's purpose so narrowly * * *. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes."

In *Brady v. Terminal R. Assn.*, 303 U. S. 10, the court below had held that an inspector looking for defects in a car, who was injured when a grab iron broke, was not within the protection of the Act (45 U. S. C. 11).[21] Again refusing this narrow construction and reversing the court below, this Court held that the inspector was within the protection of the Act "although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection," (303 U. S. at 15) and that the broad purpose of the statute required a holding that its protection was not to be determined by "the position the employee may be in or the work he may be doing at the moment when he is injured" (303 U. S. at 16).

Broad construction of the statute and its operative companion, the Federal Employers' Liability Act (45 U. S. C. 51 etc.) was seriously contested when their application to a case involving silicosis first came before the courts. Again reversing the court below in *Urie v. Thompson*, 337 U. S. 163, the novel, unprecedented, and unpredicted nature of the case was recognized by this Court but the principle of liberal construction was followed (337 U. S. at 181):

> "We recognize that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate rail-

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[20] Appendix A, page 1a.

[21] Appendix A, page 2a.

roads. Obviously, these were the major causes of injuries and death resulting from railroad operation. But accidental injuries were not the only ones likely to occur. **And nothing in either the language or the legislative history discloses expressly any intent to exclude** from the Act's coverage any injury resulting 'in whole or in part from the neglect' of the carrier. If such an intent can be found, it must be read into the Act by sheer inference * * *. 'To read into this all-inclusive wording a restriction * * * would be contrary to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act intended by this Court." (Emphasis supplied.)

The most gratuitous statement made by petitioner in its brief is that hazards of life and limb which may be overcome or minimized by the use of safety appliances do not exist in the operation of these vehicles. The necessity for adequate and efficient brakes[22] is too apparent to even discuss: the serious injuries incurred in this case and in the *Martin* case[23] attest to this fact. The absence of automatic couplers when these vehicles are used together, may not involve risk of injury in coupling vehicles, but the dangers inherent in uncoupling when in motion can be very great.[24] These vehicles, running without schedule, would be constantly in danger of being overrun by powerful, fast and heavy equipment should a coupling part and the truck be left upon the track or allowed to run freely backward down one of the many hills and mountains over which the railroads operate. The absence of uniform headlights and rear lights on motor cars operating at night may result in many types of accidents. These are only a few of the many

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[22] 45 U. S. C. 1 and 11.

[23] Infra, page 17.

[24] 45 U. S. C. 2 as interpreted in **O'Donnell**, supra, page 13.

dangers to which men using these vehicles are constantly exposed.

It cannot be doubted that the real and present dangers to men required to use motor cars, hand cars, or push trucks on the railroads are increased materially when the motor cars are used to haul cars or trucks which are not equipped with brakes. For the year 1955, Interstate Commerce Commission Bulletin No. 124[25] reports that motor cars were involved in a majority of 80 accidents which killed 5 and injured 10 men. This included 1 collision, 3 derailments and 76 miscellaneous "train accidents".[26] In the same year, 6 were killed and 14 injured when other locomotives or cars struck hand and motor cars;[27] 34 were injured in "non-train accidents" involving hand cars,[28] and 10 were killed and 326 injured in "non-train accidents" involving motor cars.[29]

Liberal construction of the Acts in the light of their prime purpose, the protection of employees requiring the use of safe equipment, must be extended to these men who daily face the risks pointed out. A contrary construction has never been made.

C.

Every Appellate Court Decision Confirms Coverage.

The consistent holding of the courts below in this case that the statutes were applicable to a motor car pulling a push truck, the vehicles here involved, is not a novel one. In fact, the decision of every appellate court in the United

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[25] In its accident bulletins, the Commission classifies hand car and motor car accidents separately from "train accidents".

[26] Table 64, items 1816 and 1817.

[27] Table 80, item 7057.

[28] Table 90, item (j); table 104A.

[29] Table 90, item (k); table 104A.

States supports the decision. Twenty years ago the Second Circuit Court of Appeals reached the same conclusion on precisely the same facts and this Court denied certiorari:

Hoffman v. New York, N. H. & H. R. Co., 74 F. 2d 227, cert. den. 294 U. S. 715.

In that case a four-wheeled gasoline tractor was used to pull a four-wheel hand car without complying with the Coupler Act (45 U. S. C. 2).[30] One of our most able Circuit Judges, Augustus N. Hand, wrote the opinion holding that the vehicles involved were within the coverage of the statute.

Very recently the applicability of the Safety Appliance Acts to motor cars was before the Courts of Florida in an accident similar to this one. Plaintiff there was operating a motor car which derailed because its brakes failed when he attempted to stop short of a pile of dirt and rock. The plaintiff secured a verdict on the basis that he had shown a violation of Section 11 of the Act.[31] On appeal the defendant argued (1) that a motor car is not a "car" within the meaning of the Act,[32] (2) that a motor car is exempt as a four-wheel vehicle under Section 6, (3) that the Interstate Commerce Commission has never adopted any standards for motor cars and has never prosecuted or even inspected them under the Act,[33] (4) that the legislative history of the Act indicates that the Act was not intended to apply to motor cars.[34] On appeal, the Supreme Court of Florida affirmed the judgment:

Martin v. Johnston, 79 So. 2d 419 (cert. den. 350 U. S. 835).

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[30] Appendix A, page 1a.

[31] Appendix A, page 2a.

[32] Appellant's brief, pp. 9 to 17.

[33] Ibid., pp. 12, 17.

[34] Ibid., pp. 17 to 24. Petitioner's statement (brief p. 26) that the Supreme Court of Florida did not have the legislative history before it, is without basis in fact.

Rejecting these arguments, it said (420):

> "We find nothing in the statutes or the reported decisions to indicate an intention that in the enactment of the above quoted statutes the Congress intended that the word 'car' should be used in a narrow, rather than in a broad, sense. As was said by the Supreme Court of the United States in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 S. Ct. 158 (49 L. Ed. 363), soon after the enactment of the law, 'manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject matter and object, "any car" meant all kinds of cars running on the rails * * *. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act.'
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> "There being as much reason for requiring the motor car in question to be equipped with efficient handbrakes, to insure its safe operation when propelled under its own power, as there is for the requirement that such a car be equipped with automatic couplers, where it is to be used in connection with a train movement, we have the view that the Safety Appliance Acts are applicable and that we are not authorized to depart from the literal terms of the statute."

This Court denied certiorari (350 U. S. 835) although the petition expressly raised the very point here contended: that a motor car is not a "car" or "locomotive" under the statutes.

Two other appellate decisions dealt with cases involving motor cars: *Chicago R. I. & G. Ry. v. Bernnard*, 275 S. W. 505, involved precisely the same facts as *Martin v. Johnston*, supra. Although the case went off on a matter of pleading, it squarely supports the applicability of the Act to this type of vehicle; in *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, cert. den. 347 U. S. 904, the decision assumes the applicability of the Act to motor cars and flatcars.

The court below places its finger upon the heart of this case when it says (233 F. 2d at 665; R. 103):

> "In the present case the motor track car was being used to haul another car, i. e., it was functioning as a locomotive and was, therefore, a locomotive within the meaning of the Act. Its actual use controls over its name."

This clear and obvious holding completely demolishes the petitioner's attempt to distinguish the *Hoffman* case and the decision in *U. S. v. Fort Worth & Denver City Ry. Co.*, 21 F. Supp. 916. Although it appeared that in *Hoffman* the four-wheeled gasoline tractor "was frequently used to haul a long line of cars" as petitioner points out, **it was not hauling such cars at the time of the accident there involved but was hauling only a hand car.** Although the crane in the *Fort Worth* case was usually used to load and unload cars it was, at the time involved, pulling other cars. Its position having been so effectively dealt with by the Court below, petitioner now urges legislative and administrative history and "practical considerations" as the basic reasons for reversal.

III.

Administrative Interpretation is Not the Guidepost to Construction.

A.

The Argument is Based upon Fundamental Fallacies.

A basic fallacy which pervades these arguments for reversal is the assumption that the user to which the cars here involved was put was one which was proved to be widespread, usual and customary in the railroad industry. This error must here be exposed, lest misconception arise

from various statements made in petitioner's brief. **Not a single word of evidence in this record proves or even suggests that motor cars are usually used, commonly used or ever used to pull push trucks, not equipped with brakes, on any other railroad.** Respondent stipulated in the District Court than an absent witness would testify, if called, that "hand cars * * * are **capable** of being towed behind railroad motor track cars * *" (R. 78) but **not** that they were in fact generally so used.[35]

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[35] The following statements in petitioner's brief and the inferences sought to be drawn from them as to their uniform use throughout the industry are not based upon the record and are not supported by it:

"They (motor track cars) are used with push trucks to carry maintenance crews and equipment * * *" (page 5).

"Air brakes or a braking system by which the driver of the motor car can cause brakes to be applied on the push truck are not used on vehicles of this type (R. 41, 99, 78)" (page 5).

"Push truck * * * are attached to motor cars with a simple non-automatic coupling device, as the pictures indicated" (pages 5, 6).

"The push truck has been used since the first rails were laid, and the motor track car is simply a push truck propelled by a small gasoline engine" (page 6).

"There are no brakemen on motor track cars and push trucks and no trainmen go between cars to couple or uncouple them. These vehicles are coupled simply by pushing them together by hand. Whether they ever could be equipped with air brakes, automatic couplers and the like is a matter of doubt. So far as is known, none has ever been so equipped" (page 7).

"In the latter part of the 19th century, railroads began to use a gasoline engine to drive the pumps on water service stations, and it was not long before ingenious track maintenance men adapted these engines to their push trucks and hand cars. Soon, almost every maintenance of way section gang had a push car or hand car equipped with a small gasoline engine which had been rigged up by the foreman or one of his gang" (page 11).

"The necessary assumption that this combination of motor car and push truck would normally be operated, in the absence of a train brake system, with a brakeman operating a hand brake on the push truck has no basis in reality" (page 14).

That it would be normally so operated **at all** has no basis in the record.

"* * * it is not likely that a section crew will be able to lift the motor car and the push truck from the tracks" (page 19).

We have here, as we had in the *Hoffman* case, a user of two vehicles or cars by the petitioner which was not the user for which they were constructed or intended. The motor car was created to carry men and equipment, as the long history recited by the Commission clearly indicates. The push truck was created to carry equipment and to be pushed or pulled by hand as its very name clearly indicates. For reasons of its own, and not supported by any custom or practice of the industry, petitioner ordered the use of the combination of vehicles without taking the slightest precaution for the safety of its employes. Petitioner's own expert witness testified that the unbraked push truck would add to the stopping distance of the combination (R. 69, 70).

A similar misconception prevails in the discussion of the attitude of the Commission. Despite the lengthy recital of the Commission's actions in both the petitioner's and the Commission's briefs, at no point is it contended (nor does the record show) that the Commission ever had knowledge that defendant was using this combination of vehicles without adequate braking equipment.

The reports and recommendations of the Commission are cited and quoted at length but no reference at all is made to the only Order of the Commission, which relates to motor cars.[36] The Order of December 14, 1925, specifically states that it is adopting "rules and instructions for the inspection and testing of locomotives by other than steam power which, **for the purposes of this order,** will be distinguished from multiple unit cars and similar self-propelled vehicles designed to carry within themselves freight or passenger traffic." For the purpose of this Order, therefore, the Interstate Commerce Commission defines a locomotive as a self-propelled unit of equipment designed **solely for moving other equipment,** and a motor car, as a self-

[36] It is significant that this was the only Commission Order relied upon by petitioner in the District Court. It was introduced in evidence (R. 81, 82, 83) as Defendant's Exhibit 4. It was urged upon the Court of Appeals (Brief for Appellant, page 19) and in its Petition for Certiorari (page 14). It is now totally ignored by both the petitioner and the Commission.

propelled unit of equipment designed to **carry freight or passenger traffic.** The Order then states that, **for its purposes,** a motor car is not to be considered a locomotive. It is apparent, therefore, that the Commission did not assume to classify the equipment except for the purposes of its Order. Its Order requires certain equipment on vehicles which it **calls locomotives,** but does not require the same equipment on vehicles which it **calls motor cars.** That is the full extent of the applicability of the Order itself. The Commission did not assume to determine what was or what was not a locomotive or a motor car, a task which was beyond the scope of its inquiry at that time.[37]

It should further be pointed out that even for the purpose of the Order itself, a motor car is supposed to carry freight or passenger traffic; **it is not supposed to move other equipment which is the task of a locomotive. In the present case, the motor car was doing the work of a locomotive under the Order, as it was moving other equipment, to wit, the push truck,** and thereby was converted into a locomotive even under the classification of the Order, as the court below has held.

B.

The Commission's Argument is Destroyed by its Own Decision.

We hesitate to question the sincerity of the Interstate Commerce Commission in its position here but we are as-

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[37] We are amazed at the Commission's citation of its own accident reporting classifications (Brief, page 19) as a basis for statutory construction. It is not so naive as to believe that this can bear any weight. In its own recent decision it swept aside the same argument (297 I. C. C. at 192):

> "The definition of a locomotive as contained in such classification is only for accounting and other reporting requirements, and a definition as used for such purposes cannot be construed as also applicable to issues for determination under the Locomotive Inspection Act involving entirely unrelated matter."

founded by the inconsistency of this position with its own action and holding in a comparable situation. It here argues that the terms "cars", "vehicles", and "locomotives" should not be held to include these vehicles because it has not considered them included heretofore. Quite the contrary position was taken by the Commission in *Ex Parte No. 179*, 297 I. C. C. 177. In this proceeding the Commission's authority to prescribe rules governing inspection of electrically operated units and multiple-unit equipment was questioned. The Hudson & Manhattan Railroad Company contended "that its equipment does not fall within the definition of a locomotive and that Congress, in fact, did not intend to confer on the Commission jurisdiction and authority to determine rules and instructions for inspecting and testing of motorcars and electrically operated units designed to carry passengers and operated by a single set of controls" (187). The argument arose from the Commission's Order of October 23, 1953, changing the definition of "locomotive" from that set forth in the Order of December 14, 1925. We have noted that the 1925 Order divided all self-propelled vehicles into two classes: (1) those "designed solely for moving equipment" and (2) those "designed to carry freight or passenger traffic". The first class is called "locomotives", the second "motor cars".[38] When self-operating electrical units designed to carry passengers became prevalent, and the need for regulations recommended itself to the Commission, it amended the 1925 definition so as to abandon this distinction entirely. The Order of October 23, 1953, redefined a locomotive as—

> "A locomotive is a self-propelled unit of equipment designed for moving other equipment and **includes** a self-propelled unit designed to carry freight and/or passenger traffic."

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[38] The very inclusion of this definition may well be thought to indicate an assumption of jurisdiction over the latter class as prerequisite to its refusal to exercise its power thereover.

But the mere fact that the Commission decided to regulate "motor cars" by calling them "locomotives" did not make them "locomotives". Or so at least the Hudson & Manhattan contended before the Commission! The Commission (writing its own answer to petitioner's argument on this appeal) said (191):

> "The amendment (to the Boiler Inspection Act) of June 7, 1924 * * * made the law apply to all locomotives regardless of the power by which they are propelled. By these amendments Congress neither specifically included nor excluded multiple-unit equipment, and its intent in this respect must be gathered from the language used in the act and a comparison made of it with other laws on the same subject. **The language in the act is all-inclusive, and considering its purpose,** which is to promote the safety of employees and travelers upon railroads, **the words 'any locomotive' as used in section 2[39] must be construed as intended to encompass all of the motive equipment of any carrier subject to the act."** (Emphasis supplied.)

Twenty-six pages of argument in the Commission's brief are completely refuted by these few lines. If the Commission did, in fact, have authority under the Act to include motor cars in 1953, that authority did not arise after the accident here involved. It pre-existed the Order of 1953 and this accident and inhered in the language of the Act itself. This is the only legal basis upon which the decision of the Commission itself can rest.

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[39] Boiler Inspection Act, 45 U. S. C. 23, Appendix A, page 3a.

C.

Petitioner is Not Supported by the Commission's Failure to Act, Existence of State Regulations, or the Failure of Congress to Amend the Acts.

An extensive argument is made that the Commission's failure to regulate these vehicles must be accepted by this Court as an interpretation of the meaning of the Act. There is no legal or logical basis for such acceptance. From the standpoint of precedent, this position is indefensible. Non-regulation or non-enforcement does not constitute a binding interpretation of the meaning of a statute.

> "It does not appear that such mere non-enforcement by the agents of the Interstate Commerce Commission, even if knowingly indulged in, could be considered to be acquiescence on the part of the Commission itself."
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> *United States v. Northern Pac. Ry. Co.*, 121 F. Supp. 397, 402, citing *U. S. v. Southern Pac. Co.*, 60 F. 2d 864.

The argument that the Safety Appliance Acts cannot have effect until implemented by regulations of the Commission has long since been overruled by this Court:

Illinois Cent. R. R. v. Williams, 242 U. S. 462.

And this Court has since said of *Williams:*

> "* * * the teaching of the case is that Commission action under §3 does not exhaust the commands of §2. See also *Southern P. Co. v. Carson* (C. A. 9th Cal.), 169 F. 2d 734, holding a railroad liable under §2 for defects in an independent wooden club used to help turn a brake wheel where the wheel itself complied with the Commission's regulations, which made no mention of the club."
>
> *Shields v. Atlantic Coast Line*, 350 U. S. 318, 322-323.

In the *Shields* case, the Commission filed a brief in support of the respondent, urging the same position it takes here. Its plea was rejected. In the *O'Donnell* case, supra, page 13, a petition for rehearing was filed presenting this same argument. Pages 3 to 14 of that petition recited in detail that the legislative history of the Act proved conclusively that Congress never intended the effect given the Act by this Court and that the Commission for over fifty years had construed the Act to the contrary. The argument was rejected and the petition denied (338 U. S. 945).

Petitioner also argues that the existence of state regulations of motor cars leads to the conclusion that they are not locomotives. The Commission echoes this argument, concluding apparently that an adverse decision here would invalidate state statutes and regulations. This argument is founded upon a basic misconception of the meaning and effect of this Court's decision in *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605. Both the petitioner and the Commission read this decision to hold that the mere passage of the Boiler Inspection Act (45 U. S. C. 23) precluded the individual states from dealing with locomotives. A little research would have disclosed the fallacy of this position. In *Napier* the issue was whether the Boiler Inspection Act had occupied the field of regulating locomotive equipment so as to preclude state regulations as to automatic doors to fire boxes and cab curtains. Under the general powers delegated to the Commission by the Act, it had, in fact, adopted complete standards covering the devices and equipment to be used on steam locomotives; i. e., it had actually occupied the field of locomotive equipment by regulating and standardizing the devices required on certain types of self-propelled vehicles which it classified as locomotives. Having done so, this Court held, the state legislatures could not enter the field of equipment on such vehicles. (So also in *Penna. R. Co. v. Pub. Service Com.*, 250 U. S. 566, this Court held that the Commission and the Post Office Department had adopted complete rules for the construction of

mail cars thereby occupying the very field of attempted state regulations.)

The limitations of the rule in *Napier*, however, have been clearly defined by this Court. In the later case of *Terminal Assn. v. Trainmen*, 318 U. S. 1, the power of the Illinois Commerce Commission to direct carriers to provide cabooses for their employees was called into question. It was argued that the Interstate Commerce Commission had been granted broad powers which included the **right** to require cabooses and therefore the State could not trespass in this field. *Napier* was cited as the authority for this holding. Distinguishing *Napier*, this Court pointed out that the Interstate Commerce Commission had never "sought to make any such requirement" and, conceding that "if it should in the exercise of granted power determine whether appellant must provide cabooses, the State would be powerless to gainsay it", nevertheless held that **until the Commission actually acted in the field, the State might reasonably regulate therein.**

In the instant case it cannot be gainsaid that the broad regulatory powers granted to the Commission include the right to regulate the equipment of motor cars. The fact that it has, by specific regulations of December 14, 1925, and October 23, 1953, refused to regulate their equipment has left the various States with full power to make reasonable regulations in that field. As said in the *Terminal Assn.* case, if the Commission should adopt regulations or standards for motor cars, the authority of the States to regulate them will terminate. It is inconceivable that the carriers or the Brotherhoods would register any objection to such regulation.

Petitioner also presses the argument that the "failure of Congress to alter the statutes after a consistent administrative interpretation of long standing creates a presumption in favor of the administrative interpretation". This argu-

ment can have no weight in the instant situation.[40] Quite the contrary is true. In the first place, there exists no expressed administrative interpretation, as has been pointed out. Of even greater moment is that fact that consistent **judicial interpretation** of the statute has held it to be applicable to motor cars and push trucks (cf. decisions discussed, supra, at pp. 16 to 19). If a presumption is to be drawn from the failure of Congress to alter the statutes, it must be based upon its acceptance and approval of the decisions of the Appellate Courts.

Equally without merit is petitioner's argument that the failure of the Commission to seek amendment of the Acts in some manner requires this Court to accept its interpretation. The contrary is undoubtedly true and historically proved. Although the Commission did in fact take the laboring oar to secure the 1896 amendment because of the Circuit Court decision in the *Johnson* case, this Court meanwhile reversed that decision (196 U. S. 1) upon its own liberal interpretation of the Act as written. And, as we have noted, in every novel situation which has arisen, this Court has consistently given a broad and liberal interpretation to the Act in the absence of Commission interpretation and even contrary to its position.

D.

There are No Practical Considerations that Support Petitioner's Argument.

The argument here made that these vehicles **cannot** be equipped with required safety devices is totally without merit. Ignoring for the moment the obvious fact that no necessity is here shown for using motor cars to pull hand

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[40] **Legislative silence and Commission interpretation were dismissed as unpersuasive in Spokane & Inland R. R. v. United States, 241 U. S. 344 and Spokane & Inland R. R. v. Campbell, 241 U. S. 497.**

cars or push trucks, there is no point at all to the railroad's insistence that a 200 pound coupler would have to be installed on these vehicles. If the smaller vehicles weigh a great deal less than 1-200th of a steam locomotive, there is no mechanical reason why an automatic coupler weighing less than 20 pounds could not be made and used. Nor is the use of cumbersome air brake equipment essential; electro-mechanical brakes could easily be devised and would probably be much more efficient. Sill steps, grab irons and brakes on cars which need them for the safety of the men using them are not as ridiculous as the railroad seems to think. On the other hand, if the motor car is used separately, as it is supposed to be used, even the railroads could not reasonably complain of a requirement that it be equipped with such safety appliances as the Commission might require. In the absence of Commission standards the railroad will not only be obliged to conform with the statutes but also to conform with all the statutes of all states in which it operates the car, as we have demonstrated, supra.

This Court has never held that every railroad vehicle must be equipped with useless and ineffective equipment which may be required on other vehicles upon which it would be useful and effective. In *Davis v. Manry*, 266 U. S. 401, this Court held that the provisions of §11 requiring ladders, running boards, handholds or grab irons were limited to cars which require them. In fact, as early as *Southern Ry. Co. v. Crockett*, 234 U. S. 725, this Court clearly stated that the safety appliances required by the Act must be applied "so far as the respective devices and standards are capable of being installed upon the respective vehicles".

IV.

The Section 6 Proviso Does Not Exempt These Vehicles.

A.

Grammatical Meaning of the Proviso.

We come now to the question relied upon by the petitioner in the Courts below: does the proviso of Section 6 exempt a motor car used to pull a push truck because both are four-wheeled vehicles. The proviso of Section 6 reads as follows:

> "*Provided*, That nothing in this Act contained (in sections 1-7 of this title)[41] shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs."[42]

Again, the first question must be what is the normal and sensible meaning of the words of the statute. Let us examine the proviso grammatically. The phrase, "when such cars or locomotives are exclusively used for the transportation of logs", must have a grammatical reference to the prior portions of the sentence in which it appears. The use of the two words, "cars or locomotives", indicates without doubt that it refers to **more than one** of the preceding phrases. The first phrase to which it must refer is that dealing with cars, namely, "4-wheel cars" or "8-wheel standard logging cars". The second phrase is that referring

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[41] As codified, 45 U. S. C. 6, printed in full in Appendix 1a.

[42] Mar. 2, 1893, sec. 6, 27 Stat. 532; amended April 1, 1896, 29 Stat. 85; 62 Stat. 909.

to locomotives, namely, "locomotives used in hauling such trains". Without referring the last clause of the sentence to **both** of the preceding phrases, the purpose of the phrase "when such cars or locomotives" is completely lost.

B.

The Proviso Must be Strictly Construed.

If any principle of statutory construction is here to be applied, it must be the time-honored principle established by Mr. Justice Story in *The United States v. Dickson*, 15 Peters 141, 165:

> "* * * we are led to the general rule of law which has always provided, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."[43]

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[43] In **Rayonier, Inc. v. United States**, —— U. S. ——, 1 L. Ed. 2d 354, decided January 28, 1957, this Court said (358-359):

> "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

The very argument that the Section 6 proviso exempts the vehicles here involved is an admission of the invalidity of the primary position taken by petitioner and the Commission on this appeal. That which is not covered by a general statute can hardly be excepted from it. As was said in **Arnold v. United States**, 147 U. S. 494, 499:

> "In **Brown v. Maryland**, 12 Wheaton 419, 438, Chief Justice Marshall recognized as 'a rule of interpretation, to which all assent, that the exception of a particular thing from general words proved that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made'."

Dealing with the exemption contained in Section 13 of the Act, the Ninth Circuit Court of Appeals said in *United States v. Atchinson, T. & S. F. Ry. Co.*, 156 F. 2d 457, 458-459:

> "We are not disposed to countenance the interpolation of exceptions not contained in the Safety Appliance Acts. That is the business of Congress. Aside from their lack of authority in the premises, the courts should not be moved by considerations of convenience or practicability to whittle away and eventually nullify the protection afforded by this beneficent legislation."

C.

Every Appellate Court Decision has so Held.

Next let us see what the courts have already said about the Section 6 proviso. No appellate court in the United States has ever excluded a four-wheeled vehicle from the protection of the Acts. In *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227, cert. den. 294 U. S. 715, as we have seen, the vehicles involved were a 4-wheeled gasoline tractor pulling a 4-wheeled hand car. The exemption of Section 6 was argued and squarely rejected, the court stating (74 F. 2d 232):

> "The exemptions of Section 6 are expressly limited to logging trains."

The exemption clauses of the Act had earlier been considered by this Court in

Spokane & I. E. R. Co. v. United States, 241 U. S. 344.

There the street railway exception contained in Section 8

was before the Court. Comparing the two, this Court said (350):

> "* * * on the face of the Statute, the object of both provisions was to exempt both the logging and the street railway cars from the operation of the Act only when used for logging on the one hand, and on street railways, on the other, and not to exempt them when not so used."

In *Martin v. Johnston*, 79 So. 2d 419, cert. den. 350 U. S. 835, above referred to and quoted, the Section 6 proviso was argued (appellant's brief, pages 10, 11) but the Supreme Court of Florida did not deem this argument to have sufficient merit even to discuss it. *Chicago, R. I. & G. Ry. v. Bernnard*, 275 S. W. 505, involving precisely the same facts as *Martin v. Johnston*, was decided on a matter of pleading but it squarely supports the applicability of the Act to this type of vehicle. In *Dougall v. Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, cert. den. 347 U. S. 904, the court assumed the applicability of the Act to motor cars and flat cars.

D.

Legislative History Supports the Court Below.

Consideration of the legislative history of the proviso of §6 and its amendment adds nothing to its interpretation except a back-room appreciation of the complete lack of consideration which one Congress may give to the deliberations of another. In the course of considering the 1893 Act, the Senate was told that there were 4-wheeled coal cars in use and requested to exempt them—nothing whatsoever was said about the existence of any other type of 4-wheeled

vehicles.[44] The original proviso was adopted upon this representation and the court below has construed it in accordance therewith. In 1896 the proviso was before the House again; this time coal cars were completely ignored and it was represented that the proviso "was evidently intended to apply to logging trains".[45] Apparently the Congress was little concerned with its predecessor's actual discussions for no further inquiry was made and the House accepted the further statement that "it happens that the cars are of eight wheels and do not come within the exception". Upon this representation the amendment was adopted.

The court below took the view that the original proviso was limited to 4-wheel coal cars and the amendment was limited to logging cars. In the *Hoffman* case, the Second Circuit Court of Appeals took the view that the proviso as amended is "expressly limited to logging trains".[46] In either view there is no basis for the argument, logically, semantically or historically, that the proviso as it now reads exempts the vehicles here involved.

E.

There is No Exemption under Section 23.

Petitioner's argument as to the Section 6 proviso also ignores completely the fact that it does not apply at all to

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[44] Despite the extensive history of maintenance of way equipment set forth at length in petitioner's brief, Senator Blodgett, in offering an amendment to Section 6 (24 Cong. Rec. 1477) said:

"I do not know that the cars containing but four wheels are used in any other service in the country except the coal service."

[45] This misconception of the Congress is conceded by the Commission in its Brief, page 14. As stated by Senator Wolcott (28 Cong. Rec. 3129) the proviso was amended for clarification, "the effect of which is merely to provide that trains used **exclusively** for logging may be relieved from the provisions of the Act."

[46] This is the view also expressed by this Court in the **Spokane** case, supra, page 32. The Commission apparently concurs in the view taken by the Court below, brief pages 2-3.

the Boiler Inspection Act (45 U. S. C. 23).[47] If the motor car is a "locomotive" within the meaning of the Act—and it is clear that it must be so held, at least where it is used as such—it comes within the provision of Section 23. This section was enacted in 1911, 36 Stat. 913, and amended by the Acts of Mar. 4, 1915, 38 Stat. 1192, and the Act of June 7, 1924, 43 Stat. 659. Congress was then fully cognizant of the text of the exemption clause in Section 6 enacted in 1893 and amended 1896; had it intended to do so, it would have referred to the exemption clause and excluded four-wheeled vehicles from the provisions of this section. The express failure of Congress to include any exemption clause in Section 23 constitutes an affirmation that Section 23 applies to **"all locomotives, parts and appurtenances thereof"**, including any which might be exempted by Section 6.

The motor car certainly was not "in proper condition and safe to operate in the service to which the same (is) put" "without unnecessary peril to life or limb" when it was used to pull a truck which had no brakes whatsoever and when the motor car itself had no brake control over the following vehicle.

This language of the Act is simple and clear. It includes not only the work for which the locomotive was designed but also that to which it is put with the employer's knowledge and acquiescence or at its direction: *Edgington v. Southern Pacific Co.* (Cal.), 55 P. 2d 253.

> "The words 'unnecessary' and 'peril' are words of every day usage and common understanding. As used in this Act we see no mystery in them. 'Unnecessary', means that which is not required by the usual circumstances. 'Peril', means an exposure to injury or destruction. 'Unnecessary peril', as used in the Act, means an exposure to injury or destruction which is not required by the usual circumstances of the particular duty the employee is to perform, but which is

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[47] Set forth in full, Appendix A, page 3a.

an exposure to injury over and above that which is usually, ordinarily or necessarily incidental to the performance of the particular duty."

Banta v. Union Pac. R. Co. (Mo.), 242 S. W. 2d 34, 40.

Regardless of the interpretation given to the Section 6 proviso, Section 23 applies to all vehicles used as locomotives and itself fully justifies the instruction of the District Judge in this case.

CONCLUSION.

The application of the Safety Appliance Acts to the vehicles here involved is required by the language of the Act, recognized principles of statutory interpretation and by established judicial interpretation. There is no justification for reading ambiguity into its language and searching through the grab-bag of administrative interpretation or lack thereof in order to narrow the effectiveness of this legislation.

If the writ is not dismissed as having been improvidently granted, the judgment should be affirmed.

Respectfully submitted,

MILFORD J. MEYER,
Attorney for Respondent.

IRVING L. CHASEN,
MEYER, LASCH, HANKIN & POUL,
Of Counsel.

APPENDIX A.

Text of Statutes Involved.

45 U. S. C. §1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. 27 Stat. 531.

45 U. S. C. §2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. 27 Stat. 531.

45 U. S. C. §6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1-7 of this title, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper United States attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in sections 1-7 of this title shall apply

to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. 27 Stat. 532; 29 Stat. 85; 62 Stat. 909.

45 U. S. C. §8. The provisions and requirements of sections 1-7 of this title shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this title, or which are used upon street railways. 32 Stat. 943.

45 U. S. C. §11. It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. 36 Stat. 298.

45 U. S. C. §23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. 43 Stat. 659.

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No. 870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

[redacted]

Petitioner,

v.

[redacted]

Respondent.

PETITION FOR A WRIT OF CERTIORARI

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

[redacted]

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER

v.

DANIEL T. JACKSON, RESPONDENT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 42 of the Revised Rules of the Court, the Interstate Commerce Commission, as amicus curiae, submits this brief in support of the petition for writ of certiorari.

The opinion of the Court of Appeals, as well as other pertinent data, including a photograph of vehicles similar to the ones involved in this case, are reproduced in the appendix to the petition. Particular attention is invited to the photograph (App. 17).

The lower court held that a motor track car and a push truck attached to the car were both subject to the provisions of the Safety Appliance Act. More specifically, the court held that the motor car is a locomotive, the push truck is a car, and the two combined are a train within the meaning of that Act.

Vehicles subject to that Act must be equipped with such devices as power driving-wheel brakes, a train brake system, automatic couplers, draw bars, sill steps, grab irons and hand holds, and hand brakes, and the Commission must promulgate the standards; namely, the number, dimensions, location and manner of application of many of those devices. 45 U. S. C. 1, 2, 4, 5, 11, and 12.

The lower court's interpretation is contrary to the understanding of this Commission, as well as that of the railroads, for over 63 years as is indicated by the fact that the thousands upon thousands of these small service vehicles, all in general use in one form or another when the legislation was enacted, have never been so equipped; the Commission has never prescribed standards for any appliances to be used thereon; and, although the Commission is charged with the duty of enforcing the Act, it has never inspected these vehicles, or issued any regulations pertaining to them, or taken any step leading to the institution of enforcement proceedings in the courts against any railroad for using these vehicles not equipped with the devices specified in the Safety Appliance Act. Also significant is the fact that there is no indication in the record nor, so far as we know, in any other source, that the railroad labor leaders, who have always been properly solicitous for the welfare and safety of their members, ever registered any objection to the fact that these vehicles were not treated as within the scope of the Safety Appliance Act.

The Commission and the railroad labor organizations played important roles in the shaping of the legislation commonly referred to as the Safety Appliance Act. I Sharfman, *The Interstate Commerce Commission,* p. 245, et seq. Their continued understanding as to its coverage should be accorded great weight. While the Safety Appliance Act should be construed in the light of its humane purposes, it is still true that railway safety legislation consists of a series of specific statutory requirements, rather than a grant of broad and flexible safety powers to the Commission, as in Section 204 (a) (1) and (2) of the Interstate Commerce Act applicable to motor carriers. In this statutory context, the Commission has been unwilling to assert a coverage of the Safety Appliance Act which is opposed to long-standing official and industry understanding, and which might create more practical problems than it would solve.

There can be no doubt that the question is substantial. As the petition points out (pp. 3 and 5), there are more than 60,000 motor track cars and many more push trucks in use on American railroads today. None of these vehicles is equipped with the devices specified in the Safety Appliance Act. To so equip them would cost millions of dollars. Moreover, it has never been demonstrated that it is physically possible to load these vehicles with all of those devices. So equipped, they would be too heavy to be lifted from the tracks by a few men and thus would be unusable. In brief, application of the Safety Appliance Act to these small service vehicles will create serious practical problems for the railroads in the

maintenance and inspection of their right of way and signal systems.

The question presented is of considerable importance to the Commission in its administration and enforcement of the Safety Appliance Act. It is of great practical importance to the railroads of this country. The petition for certiorari should be granted.

Respectfully submitted,

ROBERT W. GINNANE,
General Counsel,

C. H. JOHNS,
Assistant General Counsel,
For the Interstate Commerce Commission,
Washington 25, D. C.

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OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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v.

DANIEL T. JACKSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

ROBERT W. GIBNAME,
General Counsel,
CHARLES H. JOHNS,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	3–4
ARGUMENT	5
The small maintenance of way vehicles involved in this case are not locomotives, cars, trains or similar vehicles as those terms are used in the Safety Appliance Acts	5
CONCLUSION	26
APPENDIX—Safety Appliance Acts	27

CITATIONS

Cases:	
Hoffman v. *New York, N. H. & H. R. Co.*, 74 F. 2d 227, cert. den., 294 U. S. 715	16
Johnson v. *Southern Pacific Co.*, 196 U. S. 1	6, 9
Lilly v. *Grand Trunk R. Co.*, 317 U. S. 481	6
Napier v. *Atlantic Coast Line*, 272 U. S. 605	4, 22
Pennell v. *Phila. & Reading Ry.*, 231 U. S. 675	23
Statutes and Regulations:	
Accident Reports Act:	
45 U. S. C. 40	24
Interstate Commerce Act:	
49 U. S. C. 304 (a) (1) and (2)	5
Locomotive Inspection Act:	
45 U. S. C. 22	1, 22
Safety Appliance Acts:	
45 U. S. C. 1–16	1, 4, 27
45 U. S. C. 6	2, 28
45 U. S. C. 8	6, 15, 30
45 U. S. C. 1–7	10, 28
45 U. S. C. 11–16	17, 31
45 U. S. C. 15	35
Code of Federal Regulations, Title 49:	
Section 91.200	1
Section 125.16	19
Section 131	18
Section 132.2	18
Miscellaneous:	
24 Cong. Rec. 1280	7
24 Cong. Rec. 1477	11
28 Cong. Rec. 3093	13
28 Cong. Rec. 3129	13
H. R. Rep. 727, 54th Cong. 1st Sess	13

Miscellaneous—Continued	Page
H. R. Rep. 1558 on H. R. 378, 81st Cong. 2d Sess	5, 24
Hearing on H. R. 378 and H. R. 530, 81st Cong. 2d Sess	23
Sen. Rep. No. 1049 on H. R. 9350, 52d Cong. 1st Sess	7, 8
Sen. Rep. No. 1930 on S. 3560, 57th Cong. 1st Sess	16
Annual Reports of the I. C. C.:	
3d Annual Report (1889)	9
5th Annual Report (1891)	9
6th Annual Report (1892)	9
14th Annual Report (1900)	14
15th Annual Report (1901)	15
16th Annual Report (1902)	15
20th Annual Report (1906)	17
23d Annual Report (1909)	17
I. C. C. Accident Bulletin No. 124	19
I. C. C. Activities 1887–1937	10
Biographical Directory of the American Congress 1774–1949	11
Hertel, D. W., History of Brotherhood of Maintenance of Way Employes (1955)	20
I Sharfman, The Interstate Commerce Commission, 245	5

In the Supreme Court of the United States

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THE BALTIMORE AND OHIO RAILROAD COMPANY,
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BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

The Commission's interest in this particular case stems from the fact that it is charged with the duty of enforcing the Safety Appliance Acts [1] as well as prescribing the standards, namely, the number, dimensions, location and manner of application for many of the appliances specified in those acts.

Generally, vehicles subject to those acts must be equipped with such devices as power driving-wheel brakes, appliances for operating the train brake system, automatic couplers of a standard height, sill steps, grab irons and hand holds, and hand brakes.[2]

[1] 27 Stat. 531 (1893), 29 Stat. 85 (1896), 32 Stat. 943 (1903), 36 Stat. 298 (1910), 45 U. S. C. 1–16 (1952). The statutes are reproduced in the Appendix.

[2] Moreover I. C. C. regulations (49 C. F. R. 91.200) issued under the Locomotive Inspection Law (45 U. S. C. 22–34) require on locomotives other than steam such appliances as headlights, whistles and sanding apparatus.

So far as we are able to ascertain, every one closely associated with the subject has always construed the Safety Appliance Acts as not applying to the numerous (R. 78) small railroad maintenance of way vehicles such as are involved here.[3] As a result, those vehicles have never been equipped[4] in the manner required by the acts, and it is not difficult to perceive that a reversal of that interpretation now will raise serious practical problems not only for the railroads, but also for the Commission. Because the issue is of national importance and since it transcends the private interests of the railroad and of Jackson, its section foreman, the Commission desires to present its views to this court.

The primary ground upon which the lower court's judgment rests is that the vehicles involved here do not come within the exemption contained in section 6 (45 U. S. C. 6) which reads as follows:

> *Provided,* That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

As the opinion below states (R. 98), the proviso originally exempted "trains composed of four-wheel cars or * * * locomotives used in hauling such

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[3] Photographs of vehicles similar to the ones involved here are contained in Appendices C & D to petitioner's brief.

[4] Some of them are equipped with a type of brake and with other devices such as windshields and headlights required by State laws. Appendix B to petitioner's brief contains reference to the State laws. Also, see page 21, infra.

trains," and was intended primarily to cover coal trains. However, in 1896, the wording was changed to its present form for the purpose of including in the exemption trains made up of low eight-wheel logging cars.

While there is logic in the petitioner's argument that the proviso can be interpreted to include the vehicles involved here, in our view a preliminary question for consideration is whether those vehicles are locomotives, cars, trains or similar vehicles as the terms are used in the Acts. A negative answer to that question disposes of this case.

The lower court ruled that the track motor car is a "locomotive" and assumed that the push truck is a "car" and the two combined a "train" (requiring power brakes), as those terms are used in the Safety Appliance Acts.

SUMMARY OF ARGUMENT

The Safety Appliance Acts, applicable to "trains, locomotives, tenders, cars and similar vehicles", do not apply to small maintenance vehicles, such as the motor track car and the push truck involved in this case. The general purpose of the Safety Appliance Acts is to protect the operating employees of the railroads from hazards involved in the movement of cars and trains. This purpose was accomplished largely in two ways: (1) the requirements for the use of automatic couplers and drawbars of standard height made it unnecessary for operating employees to work between the cars; (2) the requirements for the use of power or train brakes eliminated much of the necessity for employees to operate the hand brakes on the top

of cars. The entire history of the Safety Appliance Acts reflects public and Congressional concern with the hazards of moving standard railroad cars and locomotives and "similar vehicles", such as cabooses and snow plows, which are used with such standard equipment.

Since 1893, the Interstate Commerce Commission has been charged with administration of the Safety Appliance Acts, and has played an active role in developing and perfecting this legislation. Throughout this period, the Commission has considered that small maintenance of way vehicles are not subject to the Safety Appliance Acts. This consistent administrative construction, known to Congress, the railroad industry and railroad labor organizations, is persuasive evidence that the Safety Appliance Acts were never intended to apply to such vehicles.

It is similarly significant that the railroad unions have never contended that the Safety Appliance Acts apply to small maintenance vehicles. Rather, they have concentrated upon securing State legislation which is tailored to the characteristics of such vehicles. Under the decision below that such a track car is a "locomotive", it may well follow that such state legislation is invalid on the theory that by the Locomotive Inspection Act Congress has preempted the field. *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611.

It has not been shown that it is feasible to equip track cars and push trucks with power brakes and the other appliances required by the Safety Appliance Acts. Indeed, such equipment might create additional hazards in the use of such cars.

ARGUMENT

The small maintenance of way vehicles involved in this case are not locomotives, cars, trains or similar vehicles as those terms are used in the Safety Appliance Acts

To begin with, existing railroad safety legislation consists of a series of specific statutory requirements rather than a grant of broad and flexible power as in Section 204 (a) (1) and (2) of the Interstate Commerce Act, (49 U. S. C. 304 (a) (1) and (2)) applicable to motor carriers. Thus, in 1950, when Congress was considering proposed legislation designed to give the Commission jurisdiction over operating rules and regulations of the railroads, in order to provide better protection for the small maintenance of way vehicles, among other purposes, the House Committee report[5] on the bill stated:

> Congress has from time to time enacted legislation dealing with specific matters concerning railroad safety. The more important legislation enacted for this purpose is as follows: The Locomotive Boiler Inspection Act, the Safety Appliance Acts, the Accident Reports Act, the Hours of Service Act, and the provision of the Interstate Commerce Act (Sec. 25) proposed to be amended by this bill, sometimes referred to as the block-signal law. The legislation here proposed is in line with this policy of legislating with regard to particular matters affecting railroad safety as the need for such legislation is shown to exist.

Thus, the Safety Appliance Acts and related statutes do not purport to cover every aspect of safety in

[5] H. R. Report No. 1558, on H. R. 378, 81st Cong. 2d Sess., January 31, 1950 (p. 3). Also see I Sharfman, The Interstate Commerce Commission, 245 et seq.

railroad operations. Both regulatory power and civil liability in this area must be found in specific statutory provisions.

The specific statutory provisions of the Safety Appliance Acts as amended in 1903 are applicable to:

> * * * all trains, locomotives, tenders, cars and *similar vehicles* used on any railroad engaged in interstate commerce * * * and to all other locomotives, tenders, cars, and *similar vehicles* used in connection therewith * * *. [Emphasis supplied.] (45 U. S. C. 8.)

When read in context, those provisions, while extremely broad, are not all inclusive. The term "similar vehicles" indicates that not all vehicles were being included and, as we shall demonstrate, the terms "locomotives" and "cars" were used in their ordinary sense and cannot be construed to include the small maintenance of way vehicles involved in this case.

We submit that in determining whether the small maintenance of way vehicles are subject to the Safety Appliance Acts, consideration properly may be given to the problems which brought about the legislation.[6] Before doing so, however, we invite attention to the fact that there is a sharp distinction between the safety needs of maintenance of way employees, with which we are here primarily concerned, and those of trainmen. For the latter, such devices as automatic couplers (to keep the men from going between the cars) and train brakes (to keep the men off the tops of

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[6] This court has deemed itself fortunate in having other sources to refer to and in not being left "to its own resources" in construing the Acts. *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 486. Also see *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19.

cars) are of first importance historically. In contrast, for the former, protection against trains by means of strict enforcement of sound operating rules and regulations is of prime importance.

During the last half of the 19th century, the American public became increasingly concerned over the appalling railroad casualty list. That concern was almost wholly over the lack of uniform automatic couplers[7] and power brakes on freight trains. Passenger trains were equipped with such appliances. In those days, the coupling device in general use on freight cars was the link and pin coupler, which made it necessary for employees to go between the ends of the cars and operate the coupler by lifting the pin, and frequently adjusting the link. Couplers were of different makes and heights, and there was no guarantee that they would meet when two cars were brought together. Many men were crushed in the process.[8]

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[7] Thus the Senate Report on the original bill stated (Sen. Report 1049, on H. R. 9350, 52d Cong., 1st Sess., p. 5):

"* * * Were the use of freight cars limited to a single State then State laws would be adequate, but the cars within any State at any particular time are largely such as pass from road to road, and from State to State indiscriminately, no State line being recognized in railway traffic. The freight car of Massachusetts loaded with the products of that State may in three weeks reach California, passing from ocean to ocean; or the car of an Illinois road may pass through three or four States in a less number of days on its journey from the Lakes to the Gulf. Either of them may have the coupler sanctioned by the State from which it started, but from its lack of interchangeability with the couplers of those cars with which it must be coupled to perform its mission of transporting the commerce of the country; it produces death and destruction in every freight yard it enters."

[8] The following vivid description of the operation is found at 24 Cong. Rec. 1280:

"Just imagine what takes place every time a freight train is

The agitation for power brakes on freight trains centered around the desire to eliminate, as far as possible, the necessity for employees to be on top of the cars to operate the hand brakes on a moving train. Thus Lorenzo S. Coffin, of Iowa, testifying on behalf of the Brotherhoods, among others, in support of the proposed safety law in 1892,[9] stated:

> "Many contend that a bill requiring "power" or "train" brakes—for they mean one and the same thing—is more necessary and important than one requiring automatic couplers. As a matter of fact there are nearly twice as many men killed yearly from being required to use hand brakes on freight than are killed from handling couplers, but there are not so many injured. The casualties are more fatal.
>
> Statistics from the Interstate Commerce Commission reports show that 557 were killed from falling from trains, and 2,348 injured in the year ending June 30, 1890. These men receive their death and injuries from being obliged to be on top of freight trains to use handbrakes. When

made up. A railroad employee, a laboring man, is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands. It is being pushed up by the locomotive away at the farther end of the train, 100 cars off perhaps, the engineer utterly unable to see the space which is to be filled up by his train, pushing the train back, back, back, watching perhaps for a wave of the hand or a wave of a lantern to tell him when he has gone far enough. With that engineer moving that train this long distance off, there stands the railroad's employe waiting until the cars come up near to him, which a few inches nearer would destroy him. Then if the dead wood come together and his life is saved, he is to couple the cars."

[9] Sen. Rep. No. 1049, on H. R. 9350, 52d Cong., 1st Sess. on July 22, 1892, (pp. 109–110).

> is added to this the great number of accidents resulting from collisions, and running into open switches, and obstructions which could have been avoided had cars been equipped with power brakes under the immediate control of the engineer, the number would at least be swelled 50 per cent. The mere statement of this terrible fact, which no intelligent man will question, is all the argument that need be offered in favor of a law requiring that all interstate freight trains shall have enough cars in such trains equipped with power brakes so that the engineer can at all times control his train without requiring human beings to be at the cruel and inhuman exposure incident to the work of controlling trains by handbrakes.

The subject was of such importance that President Harrison on several occasions [10] urged enactment of legislation dealing with automatic couplers and power brakes on freight trains. Thus, in his annual message in December, 1889, he directed attention to a resolution of the State Railroad Commissioners calling upon the Interstate Commerce Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars and in handling the brakes of such cars".[11]

Needless to say, the Interstate Commerce Commission took an active part in urging the legislation.[12] Thus we

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[10] Id. (pp. 2–3); *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19.

[11] The Commission's Annual Report of 1889, at pages 85–86 relates that the State Commissions were urging Federal legislation because State action could not cope with a subject which required uniform national rules.

[12] See Commission's Annual Report of 1889, pages 84–101, the report of 1891, pages 337–340 and report of 1892, pages 69 and 74.

are told in Interstate Commerce Commission Activities, 1887–1937, at page 118:

> Prior to 1887, some State safety legislation had been enacted and the subject of safety had been given serious consideration by the Master Car Builders' Association. The State legislation proved both conflicting and inadequate, and the constructive findings of the Master Car Builders' Association were often ignored. Federal action was early urged upon the Commission. In a report to Congress in 1889 after a general investigation of the subject had been made, the Commission analyzed the causes of casualties and emphasized the need of Federal legislation. This need was reiterated in its report for 1891. Edward A. Moseley, who came to Washington in 1887, as the first Secretary of the Interstate Commerce Commission, became so convinced of the necessity for adequate safety laws that he immediately began a campaign of education and agitation for Federal legislation. To his untiring efforts more than to anything else may be attributed the passage of the Safety Appliance Act.

Against this background, the original Safety Appliance Act was enacted in 1893. 45 U. S. C. 1–7. It was limited to those locomotive engines and cars operated in interstate commerce. Section 1 required a power driving-wheel brake and appliances for operating the train brake system on the locomotives; trains were to have a "sufficient" number of cars equipped with power brakes so that they could be controlled "without requiring brakemen to use the common hand brake for that purpose." Section 3 provided that once a railroad had complied with Section 1, it could refuse to accept from other lines any cars not suffi-

ciently equipped with train brakes "as will work and readily interchange with the brakes in use on its own cars". Section 2 provided that cars were to be equipped with automatic couplers so that men would not have to go "between the ends of the cars", and under Section 5 the draw bars (couplers) on freight cars were to be of a standard height. Section 4 required that the cars were to be provided with "secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." Under Section 7, the time for compliance specified in the Act could be extended by the Commission, and under Section 8 the defense of assumption of risk was abolished. Section 6 provided a penalty for violation of the Act, and enjoined the Commission to bring to the attention of the proper district attorney information of any violations which came to its knowledge. The proviso of that section exempted from the Act "trains composed of four-wheel cars or * * * locomotives used in hauling such trains".

The proviso was offered as an amendment to the original bill. The Senator offering the amendment stated:[13]

> Mr. BLODGETT. I desire to offer an amendment. At the end of section 6 of the bill as reprinted I move to add the following proviso:
> *Provided,* That nothing in this act contained

[13] 24 Cong. Rec. 1477. Senator Blodgett was superintendent of the New York & Long Branch Railroad from 1884 to 1910, and a builder of railroad equipment. Biographical Directory of the American Congress, 1774–1949 (p. 861).

shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

* * * * *

Mr. President, I presume most Senators understand that coal from the mines is transported to the seaboard in four-wheel cars. The custom is to run such cars to the junction points of lateral roads and from those junction points to the mines where they are loaded. The four-wheel cars are used, because it would be practically impossible to run an eight-wheel car to the mines over the sharp grades and around the sharp curves necessary in reaching the mines. The coupling construction is a peculiar one, and is adapted to that peculiar work. A hook arrangement and link are used with considerable lost motion between the cars.

It is necessary to use that appliance, as I said, in order to go around the sharp curves. I believe it would be practically impossible to place the train brake and automatic coupler upon cars such as are used in that traffic, and if the bill is not amended as I propose, it will compel a reshipment of coal at all the junction points on the lateral roads to the main stem. I do not know that the cars containing but four wheels are used in any other service in the country except the coal service. Hence, I think the amendment is a very proper one.

The wording of the proviso as it exists today was inserted in 1896. The purpose of the 1896 amendment was to exclude trains composed of low eight-wheel logging cars. Thus as originally proposed the amendment read:

> *Provided,* That nothing in this act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such cars from top of rail to center of coupling does not exceed 25 inches, or to locomotives used in hauling such trains.

As indicated in a letter attached to the House Report [14] on this proposed amendment, the Interstate Commerce Commission was concerned over the proposed outright exemption of logging cars and, apparently in an attempt to restrict the amendment, the following words were added thereto on the floor of the House upon recommendation of the Committee: "when such cars or locomotives are exclusively used for the transportation of logs". 28 Cong. Rec. 3093. The amendment as thus changed was passed by the House, and on the next day by the Senate, after the following explanation by Senator Wolcott (28 Cong. Rec. 3129):

> There has just come over from the other House a bill to amend the act to promote the safety of employees and travelers. A similar bill was unanimously reported from the Committee on Interstate Commerce of the Senate, the effect of which is merely to provide that trains used exclusively for logging may be relieved from the provisions of the act. The cars used in logging trains, of which there are about 400 in the United States, are only 24 inches high, and it is physically impossible to equip them with grab irons and the other appurtenances required by law. The act goes into force very soon, and I hope the bill may now be

[14] H. R. Rep. No. 727; 54th Cong. 1st Sess. (1896).

> passed. It has passed the House of Representatives and a similar bill has passed our committee unanimously.

As the lower court pointed out in its opinion, the draftsman of the House Report mistakenly stated that the proviso in the original act was "evidently intended to apply to logging trains". (R. 101–102.)

The history of this proviso shows quite clearly that the vehicles which were to be included under the law were those "cars" and "locomotives" which could reasonably be equipped with power brakes "as will work and readily interchange with the brakes" on other equipment and with automatic couplers of a standard height.

By 1900, the railroads were in substantial compliance with the law, and, pursuant to the Commission's order, all provisions became effective on August 1 of that year. Thus the Commission was able to state in its 14th Annual Report (1900) at page 76:

> The Safety Appliance Act in all its provisions, therefore, became effective on the 1st of August last, and, as far as can be ascertained, practically all roads in the United States have since then been using automatic couplers and air brakes in the operation of their trains. That portion of the law which fixed the standard height of drawbars and made necessary the application of hand holds and grab irons has been in operation for almost five years, and, as said by the Commission in former reports, the state of equipment in those particulars has shown approximately perfect compliance with the statute.

However, the Commission was not satisfied with the law as it stood and discussed the matter in its Annual Reports of 1901 and 1902. Thus, it pointed out that the automatic coupler and hand hold provisions of the Act should be amended specifically to include locomotives, tenders and snow plows and that:

> * * * Both of these provisions of law, as also the requirement of a standard height for couplers, might reasonably be made to cover all vehicles, passenger, freight and miscellaneous, which are ordinarily hauled or propelled by standard locomotives. * * * [15]

Also:

> * * * provisions relating to automatic couplers, grab irons, and the height of drawbars, [should] be made to apply to all locomotives, tenders, cars, and similar vehicles, both those equipped in interstate commerce and those used in connection therewith (except those trains, cars and locomotives exempted by the acts of March 2, 1893, and April 1, 1896); * * * [16]

In line with these recommendations, the Act was amended in 1903 to include "trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce" and "all other locomotives, tenders, cars and similar vehicles used in connection therewith" except those covered by the proviso of section 6 and those used on street railways. 45 U. S. C. 8.

The legislative history reveals that the term "similar vehicles" was used advisedly. In the original bill,

[15] Annual Report 1901 (p. 68).
[16] Annual Report 1902 (p. 61).

the unrestricted word "vehicles" had been used, and a railroad representative had objected to it on the ground that it was too broad. He suggested the term "traffic cars". The legislative representative of the Brotherhoods agreed that the term was broad but stated that the suggested substitute was not satisfactory because:[17]

> * * * there are cabooses, steam shovels, snowplows, scale cars, and similar conveyances. There are men in the western part of the country who are engaged for weeks in the winter in doing what they call "bucking snow"; to do that they have to couple on to snowplows. They should also be equipped with these appliances.

The term "vehicles" was thereafter changed to "similar vehicles". This history indicates quite clearly that the term was used to cover such special equipment as snow plows and the like, which for purposes of transportation are similar vehicles and can be used in connection with the standard equipment.[18] The term clearly does not include the small maintenance of way vehicles, and of course, those vehicles are in no sense similar to special equipment such as cabooses, snow plows and the like. They are, therefore, not trains, locomotives or cars as those terms are used in the Acts.

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[17] Senate Report No. 1930, on S. 3560, 57th Congress, 1st Sess., (p. 46).

[18] The term could also reasonably be construed to include the four-wheel gasoline engine involved in *Hoffman* v. *New York, N. H. & H. R. Co.*, 74 F. 2d 227, cert. den., 294 U. S. 715, because that vehicle was equipped with an automatic coupler and was frequently used in the place of a locomotive. A picture of those vehicles is contained in this court's file No. 647, Oct. Term 1934 (R. 394).

The Commission continued to give close attention to the subject, and reported to Congress on matters which were deemed worthy of attention. Thus, in its 1909 Annual Report, at pages 40–41, the Commission stated:

> As pointed out in previous reports of the Commission, however, the law is too limited in its scope to afford that full measure of protection to which railroad employees are entitled. * * * Such appliances as sill steps, ladders, roof hand holds, running boards, and hand brakes are vitally necessary for the safety of employees, and it is of the highest importance that they be properly applied and maintained in the best possible condition; but as these appliances are not covered by the law, proper attention is not always given them and they are often permitted to run in an unsafe condition. * * *.
>
> The strongest argument for the extension of the law here recommended is found in the necessity to secure uniform equipment. It is of vital importance to employees that the appliances designed for their safety shall be placed alike on all cars of the same class, so that they may know with certainty, night or day, that they will always find them in like positions and locations.
>
> * * * * * *

The recommendations included the hand brake because "since the general introduction of air brakes the condition of the hand brakes has been sadly neglected". (1906 Annual Report p. 70.)

Pursuant to these recommendations, the Act was supplemented in 1910 to include certain additional safety appliances, 45 U. S. C. 11–16. Cars were to be

equipped with secure sill steps and efficient hand brakes; cars requiring secure ladders and running boards were to be so equipped; secure hand holds or grab irons were to be installed on the roofs at the tops of such ladders, and the Commission was to designate the standards for these and certain other appliances, as well as to modify or change and prescribe the standard height for draw bars.

Thereafter, the Commission, by order dated October 10, 1910, prescribed the standard height for draw bars on freight cars,[19] and by order of March 13, 1911,[20] fixed the standards for handbrakes, grab irons and hand holds, sill steps, ladders and running boards for each type of vehicle. Those orders, of course, do not refer to the small maintenance of way equipment. The reason is obvious. The very nature of that equipment and the appliances specified in the 1910 Act make it abundantly clear that the term "car" is used there in the same sense as in the earlier act. Those vehicles by their very nature cannot reasonably be equipped with the appliances listed. Of course the track motor car is equipped with a brake, but if that vehicle is a car within the meaning of the Acts, so is the push truck. Secure sill steps and efficient hand brakes on the push trucks would hardly serve a useful purpose.

For over half a century, the Commission has administered the Safety Appliance Acts, as well as the other acts relating to railroad safety. During this period, the Commission has never considered the small

[19] 49 CFR 132.2.

[20] Amended in 1943 and republished in 1946. 49 CFR 131.

maintenance of way vehicles subject to those acts,[21] and we submit that the foregoing contemporary and legislative histories furnish a sound foundation for its view. That legislation is concerned with locomotives, cars and similar vehicles which employees were formerly required to go between to couple, or to ascend to use the hand brake. The acts are designed primarily to reduce or eliminate those hazards. They

[21] Those vehicles are not considered trains, locomotives or cars under any of the railroad safety legislation. Thus the track motor car is not a locomotive under the Locomotive Inspection Law (R. 83) and for accident reporting purposes the vehicles are not considered as trains, locomotives or cars. For example, I. C. C. Accident Bulletin No. 124 (1955) defines trains, nontrain and train accidents as follows (p. 94):

"The term 'train' as used in this bulletin refers to a locomotive or more than one locomotive coupled, with or without cars, displaying markers. For the purpose of accident classification, locomotives, with or without cars, engaged in switching movements, are also considered trains. Hand cars, section motor cars, and like roadway machines are not regarded as 'cars.'

* * * * *

"Nontrain accidents are accidents not caused directly by the operation or movement of trains, locomotives, or cars that result in reportable casualties. Nontrain accidents to employees on duty are classified as attributable to:

* * * * * *

"(j) Maintenance-of-way and structures hand cars (nontrain accidents only).

"(k) Maintenance-of-way and structures motor cars (nontrain accidents only).

* * * * * *

"Train accidents are accidents with or without casualties, arising in connection with the operation or movement of trains, locomotives, or cars that result in damage to equipment or other railway property of $375 or more (including cost of clearing wreck) * * *."

Also see 49 CFR 125.16, et seq.

should not be construed to apply to entirely different types of equipment whose operation does not involve such risks. "Train" brakes on the vehicles involved here might well get the men off the tops of the cars, but not as the expression is used in the legislative history. In the absence of tests showing otherwise, it would seem that power brakes on push trucks towed by a track motor car could well be about as dangerous a device to employees riding on such vehicles as one can imagine.

As we have previously indicated, the railroad labor leaders played an important role in the enactment of the Safety Appliance Acts. Their views on whether the small maintenance of way vehicles are subject to the Safety Appliance Acts are therefore pertinent here and are not difficult to ascertain. To begin with, the Brotherhood of Maintenance of Way Employes, insofar as we are able to determine, has never challenged, informally or otherwise, the Commission's interpretation of those Acts as not applying to such vehicles. Its interest in specific appliances on those vehicles has not involved such items as automatic couplers, power brakes and the like. Rather its interest has been in windshields, windshield wipers, canopies and the like. In that field, it has properly sought and obtained state legislation. Thus, we are told in the *History of Brotherhood of Maintenance of Way Employes:*[22]

> Another long-standing grievance of railroad workers was the failure of the railroads to

[22] By D. W. Hertel, published by Ransdell, Inc., Washington, D. C., 1955 (pp. 212–213).

provide basic safety and protective equipment on track motor cars, used to transport thousands of railroad workers, most of them maintenance of way men, and tools and materials, to and from their headquarters and points of work, and from job to job over the lines of the carriers. The employes ride these cars in all kinds of weather. The average distance over which these cars are operated has been increased considerably in recent years by the lengthening of territories under the jurisdiction of maintenance of way gangs.

Numerous accidents resulting in serious injury and death to many railroad workers have occurred because track motor cars were not adequately equipped to provide for the safety and protection of the employes. Travel in dusk or in darkness or through tunnels becomes a serious hazard to workers riding on track motor cars not equipped with adequate electric headlights and taillights. No estimate can be made of the health and safety hazards encountered by railroad workers who must ride on open-deck motor cars without any protection from the elements.

Because many carriers had not provided this equipment, in spite of the repeated requests of the employes, the Brotherhood began in 1949 the sponsorship in state legislatures of bills requiring that track motor cars be equipped with electric headlights and taillights, windshields, windshield wipers, and canopies or tops. Although these bills are basic safety measures, most railroad managements have vigorously opposed their enactment, contending that electric headlights are not needed and that windshields and tops are "luxury equipment."

> Nevertheless, during 1949 and in subsequent years through 1954, twenty-six states have passed track motor car laws. Unfortunately, however, these state laws are not uniform and not all of them require full equipment. Although all twenty-six laws require electric headlights on motor cars, only seventeen require windshields, thirteen require windshield wipers, and ten require tops.

Under the various amendments to the Boiler Inspection Act, now commonly known as the Locomotive Inspection Act, 45 U. S. C. 22–34, Congress has occupied the entire field of regulating equipment on railroad locomotives. *Napier* v. *Atlantic Coast Line,* 272 U. S. 605, 611. If the track motor car is a "locomotive" as the lower court holds, 26 states, on the specific request of the Brotherhood of Maintenance of Way Employes, appear to have trespassed in a field already pre-empted by Congress. Such a conclusion should not be reached in the absence of a clear Congressional purpose to so regulate.

In the Federal field, the Brotherhood has concerned itself only with proposed legislation aimed at strict enforcement of sound operating rules and regulations. Specifically, in 1949–1950, the Commission attempted to obtain legislation giving it jurisdiction over railroad operating rules and practices. The Commission deemed the additional authority necessary, in part at least, to provide more adequate protection for the men during the operation of the track motor cars. That proposal was supported by the Brotherhood, whose president pointed out that 95 percent, or more, of all track motor car accidents

were caused by failure to provide adequate protection through operating rules and regulations for the movement of those vehicles.[23] No one suggested that the Commission had erred in failing to apply the existing Safety Appliance Acts to such vehicles.

We urge here a practical interpretation of the legislation. The Commission and this Court have adopted a practical view of these acts even with respect to equipment which, if the acts were literally construed, would require such appliances as automatic couplers. In its order of 1911, setting forth the standards, the Commission specified automatic couplers for the rear of tenders and the front of locomotives. Thus the act as interpreted by the Commission did not require automatic couplers between the engine and its tender. This practical interpretation was accepted by this Court in *Pennell* v. *Phila. & Reading Ry.*, 231 U. S. 675. The facts there as shown in the opinion were:

> The train was composed of forty-four cars, some loaded and some empty, and the engine, tender and caboose. The coupling between the cars was automatic, that between the engine and the tender was a draw-bar and pin. The pin broke in consequence of the air hose breaking or parting between the first and second cars from the caboose, thereby setting the brakes on the whole train. By the breaking of the coupling between the tender and the engine, Pennell, plaintiff's intestate, was thrown from the train upon the track and killed on Decem-

[23] Hearings before the House Subcommittee on Interstate and Foreign Commerce on H. R. 378 and H. R. 530 on May 17, 1949, page 41.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING

Immediately after the Court's decision in this case on May 13, 1957, an investigation was begun to ascertain whether or not track motor cars and push trucks could be brought into compliance with Sections 1 and 2[1] of the Safety Appliance Act of 1893, and, if so, what cost would be imposed on the railroads and what weight would be added to the vehicles. Inquiries were addressed to prominent suppliers of air brakes and couplers. The results of these inquiries appear in affidavit form as attachments to this petition, and the

[1] Throughout this petition all references to sections of the Safety Appliance Acts are to the U. S. Code sections at the present date.

attention of the Court is respectfully directed to them. They contain factual matter relevant to the issue of whether a rehearing should be had in this case.

With respect to brakes, the affidavits of Westinghouse Air Brake Company and The New York Air Brake Company indicate that while no train brake system in use on railroads today is adaptable to use on track motor cars and push trucks, nevertheless, parts from systems in industrial use could be combined to perform the function of a train brake system on a track motor car and push truck. This equipment would cost from $460 to $620 for each track motor car and from $90 to $190 for each push truck so equipped. It would add approximately 100 pounds weight to the track motor car and 25 pounds to the push truck.[2]

With respect to couplers, it appears that no couplers now in railroad use are adaptable to use on maintenance of way vehicles. However, the "reduced size Willison coupler," manufactured by National Malleable and Steel Castings Company for use on trains of mine cars is smaller and presumably could be used on maintenance of way vehicles. These couplers, together with the pocket casting required, and without cushioning equipment, would add $120 cost to each vehicle and would add approximately 200 pounds in weight.[3]

Since there are 60,000 track motor cars in use on the country's railroads today (R. 78), and at least as many

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[2] The affidavits of Westinghouse Air Brake Company and The New York Air Brake Company are printed herewith as Appendix A. Price estimates in each affidavit are substantially the same. (App. 16, 22-23) Weight estimates are taken from New York Air Brake figures for the fighter system. (App. 22).

[3] The affidavit of National Malleable and Steel Castings Company is printed herewith as Appendix B.

push trucks, it follows that imposition of the requirements of Sections 1 and 2 of the Safety Appliance Act on maintenance of way vehicles will cost the railroads from $34,800,000 to $44,400,000 to equip track motor cars with brakes and couplers and an additional sum ranging from $12,600,000 to $18,600,000 to equip push trucks.

Track motor cars will be increased in weight by 300 pounds and the push trucks will be increased in weight by 225 pounds. In view of the fact that these vehicles must be lifted from the tracks by three and four man section gangs at the place of work or in the event a train comes by and since frequently the vehicles must be lifted from the track in a hurry, added weight in this amount is and should be a matter of grave concern to railroad management and labor.[4]

Prior to May 13, 1957, the Safety Appliance Acts did not apply to these vehicles. If the safety of railroad employees and the public will be substantially increased by air brakes, automatic couplers and the other devices, railroad managements have no choice but to pay the bill and section gangs have no choice but to handle the added weight. In view of the costs and practical consequences, however, a decision that the Acts apply should not be made in the absence of a determination after proper inquiry that the improvement in safety justifies the costs and other burdens imposed. In effect, the majority has made such a determination in this case, but it has not had the benefit of accident statistics, expert testimony from the Interstate Commerce Commission, from railroad manage-

[4] According to Respondent, track foremen customarily remove two cross pieces with strap iron on top which are on push trucks as they come from the shop, *"in order to make them lighter to handle."* R. 40.

ment, from railway labor organizations, or from equipment manufacturers, the sort of factual information that should form the basis for this far-reaching change in the law. This change is made on no factual basis at all.

A decision to hold, 65 years after its enactment, that the original Safety Appliance Act applies to maintenance of way vehicles would normally be (and is by the majority) predicated upon two propositions of fact:

1. Maintenance of way vehicles as presently operated are unsafe.
2. The difficulty will be remedied or at least ameliorated if the railroads are compelled to equip the vehicles with the appliances required by the Safety Appliance Acts.

In this case the majority has resolved both of these factual issues in the affirmative, in favor of coverage. An inquiry into the basis of these determinations reveals that with respect to the first, the Court found that the track motor car was equipped with a simple hand brake "designed for its individual operation" (page 4). It is further found that "the brake was wholly insufficient for the use to which the railroad put the vehicles" (page 4). The basis for these two findings is presumably the testimony of Respondent Jackson, referred to on page 3 of the opinion, to the effect that the two cars skidded 39 feet before impact whereas the track motor car alone would have stopped within 6 to 8 feet under the same conditions.

As to the second proposition, that the appliances required by the Acts would improve railroad safety, the

majority *has simply assumed this proposition to be true.*

It is submitted that regardless of trial rules concerning inferences, presumptions and burdens of proof in a personal injury case, and regardless of the tests a court applies to determine whether a plaintiff has produced enough evidence to sustain a jury verdict, the information with respect to safety needs and the effect of Safety Appliance Acts on them before this Court in this case is wholly inadequate as a basis for imposing on the railroads a cost of some $50,000,000, and on section gangs all over the country the inconvenience of 225-300 pounds more weight on these 800 pound vehicles.

The majority ignores testimony in the case by the Respondent elsewhere that the cars skidded only 20 feet. (R. 31) and testimony by an expert that the claim that the motor car alone could have been stopped in 6 to 9 feet was impossible (R. 62-69). It has treated Respondent's evidence as if the issue were whether there was any evidence to go before the jury in support of his claim, and has generalized from it to reach the proposition that a safety hazard exists with respect to brakes (and couplers) on maintenance vehicles generally.

In a personal injury case such as this, an adequate record will never be made on the question of whether or not conditions will be made more safe if air brakes and automatic couplers are installed on maintenance of way vehicles. There is a strong body of opinion to the contrary as indicated by the Interstate Commerce Commission's *amicus curiae* brief and by the arguments urged for rehearing by the Association of Amer-

ican Railroads.[5] It is particularly significant that the Brotherhood of Maintenance of Way Employees has not been before this Court urging the Court to rule that the Acts be interpreted to apply to these vehicles. The Brotherhood, always alert to the safety needs of its membership, would certainly have participated in this case had it held the view that application of the Acts would increase safety.

In this situation it is submitted that the Court should be loath to overturn 65 years of operation under this statute, 65 years of Commission interpretation of it, whether positive or negative. The sheer economic waste if the majority's assumptions are wrong should alone be a deterrent.

The majority opinion appears to assume that there is some way that the Interstate Commerce Commission can alleviate the requirements of the Acts if it finds that safety will not be advanced by the installation of any of the required appliances. On page 5 of the opinion the majority appears to indicate that the Commission could rule that power brakes are not required on motor track cars.

> "It is said that there is no place on the vehicles in question here for a grab iron or a hand hold and that power brakes might well increase the hazards of their operation. This may be true, but if these vehicles are to be used in a manner such as here, the Commission through the promulgation of standards or regulations covering such equipment should adapt the safety requirements of the Acts

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[5] Not only does the added weight make it more difficult to remove the cars from the track in an emergency, but couplers which must be uncoupled and hose connections which must be broken further complicate this job.

to the safe use of such vehicles and thus protect employees and the public from the hazards of their operation."

If this language means that the Commission has the power to rule that power brakes are not required, no support can be found in the statutes for it.

Section 1 requires power brakes on locomotives and train brakes on trains and Section 2 requires automatic couplers. The requirements are mandatory and absolute and no provision of the Acts gives the Commission any authority to modify or postpone the requirement that *some type* of power brake, train brake and coupler be employed on these vehicles.

The power which the Commission has under Section 12 to prescribe the number, dimension, location and manner of application of appliances applies in terms only to the grab irons required by Section 4 and to the sill steps, efficient hand brakes, ladders and running boards required by Section 11. Even in that situation, the Commission's power is limited to the standardization of these appliances and their location; this Court has held that the Commission does not have the power to postpone for a day the requirement that some kind of appliances of the required character be present on the cars. *Illinois Central Railroad Company* v. *Williams*, 242 U. S. 462 (1917).

Even under the majority decision, in spite of the language quoted above with respect to power brakes, it is doubtful if the Commission has the authority to modify the basic requirement that appliances meeting the statutory description be used. Thus, train brakes and couplers are in no different position under the statute than are power brakes and yet it is inconceiv-

able that the Commission could hold, after the findings which the majority has made, that a train brake system was not required because there was no need for it or because it increased safety hazards rather than reducing them and accordingly that the railroads were not required to install train brakes on maintenance vehicles.

The majority should clarify its holding with respect to the question of what appliances must be employed when the vehicles are used separately. This is a criminal statute imposing criminal penalties. If this Court is to hold that the statute applies to maintenance of way vehicles, the railroads of the country are entitled to a clearer exposition of the Court's interpretation of the Acts with respect to separability than is found in the sentence, "If [the vehicles are] used separately, though we do not pass on the question, it may well be that entirely different sections of the Acts might apply to each of the vehicles" (page 3).

In view of the burdens which this decision imposes on the railroads of the country and the maintenance of way employees of the railroads, and the strong possibility that safety of employees will actually be reduced by this decision, we respectfully request a rehearing in the case.

One further point of a purely legal nature should be made. As we have argued previously, it is as clear as anything can be that Congress never intended to cover these vehicles in enacting the Safety Appliance Acts. The legislative history demonstrates beyond question that the problems Congress sought to meet with this legislation had literally nothing to do with these

vehicles. Accordingly, on rehearing, we would ask the Court to review its holding that the words "all trains, locomotives, tenders, cars, and similar vehicles," constitute "plain language [which] could not have been more all inclusive" so as to make resort to the legislative history unnecessary or improper, whereas the words "four-wheel cars" in Section 6 are so unclear as to require resort to the legislative history, and the holding that the words mean "four-wheel coal cars" even though no Congressional intent to limit the exemption to coal cars is any where expressed. It seems impossible to state a principle of statutory construction which justifies resort to legislative history in the second instance and bars resort to legislative history in the first.

A rehearing in this case is requested.

Respectfully submitted,

STEPHEN AILES
LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.
Attorneys for Petitioner

STEPTOE & JOHNSON
Of Counsel
June 7, 1957

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

STEPHEN AILES
Counsel for Petitioner

APPENDIX A

Affidavit

County of Allegheny }
Commonwealth of Pennsylvania } ss.

Samuel L. Poorman, being duly sworn, deposes and says:

1. That he is a Vice President of Westinghouse Air Brake Company; and is in charge of sales activities for the Air Brake Division of said Company.

2. That Westinghouse Air Brake Company is a corporation of Pennsylvania, with executive offices at Pittsburgh, Pennsylvania; and the Air Brake Division of said Company has a principal manufacturing plant and general offices at Wilmerding, Pennsylvania.

3. That the Air Brake Division of said Company manufactures at its Wilmerding, Pennsylvania plant a wide variety of air brake equipments and parts for locomotives and cars, of the passenger and freight type, of railroads, street railways and subways; and sells such products, particularly to railroads, throughout the United States, Canada, Mexico, and many foreign countries in South America, Europe, the Middle East and other parts of the world.

4. That the present Westinghouse Air Brake Company is the successor to the original parent company, The Westinghouse Air Brake Company, organized in 1869 by its founder, George Westinghouse, the inventor of the air brake; that the experience and know-how of the Air Brake Division of the present Westinghouse Air Brake Company in the manufacture of air brakes for railroads and railways dates from that time; that the Air Brake Division of Westinghouse Air Brake Company and its predecessor, the original parent company, have been and are leaders in the air brake industry in the production of the braking systems now standard for many railroads in various countries, and in the development of many new and improved air brake devices and systems for the greater efficiency and

safety of operations of railroad locomotives, cars, and trains and, in particular, have led the air brake field in the development of many improvements in the present-day standard freight train air brake equipment known as the AB brake equipment.

5. That deponent entered the employ of the original parent Westinghouse Company in 1912 and thereafter served in various engineering, sales, and commercial capacities in various district offices, becoming Eastern Manager in charge of the New York District Office in 1938; that in 1944 deponent became Assistant to the First Vice President with offices at Wilmerding, Pennsylvania, and later in 1945 Assistant Vice President at Wilmerding, Pennsylvania; that deponent has served in his present capacity as Vice President-Sales with offices at Wilmerding, Pennsylvania since 1946.

6. That deponent is familiar with the various types of air brake devices, equipments, and parts which are presently manufactured and sold by the Air Brake Division of Westinghouse Air Brake Company.

7. That deponent is familiar with the request for quotation received by the Air Brake Division of Westinghouse Air Brake Company from the Baltimore and Ohio Railroad Company relative to the cost of furnishing air brake equipment for track motor cars and hand cars.

8. That under deponent's supervision, the Air Brake Division of Westinghouse Air Brake Company has prepared and submitted to the Baltimore and Ohio Railroad Company, a quotation in regular form, a copy of said quotation marked Exhibit A being attached hereto and forming part hereof, in answer to the request for quotation made by the Baltimore and Ohio Railroad Company, as referred to in the preceding paragraph.

9. That in view of the fact that it has not been the practice to apply air brake equipment to track motor cars and

hand cars, the Air Brake Division of Westinghouse Air Brake Company has not previously been called upon to furnish and does not presently have for offering nor does it manufacture a recommended standard commercial air brake equipment specifically designed for such vehicles; that the alternate schedules of equipment identified in the aforesaid quotation represent a compilation of present standard components, such as brake valves, brake cylinders, control valves, regulating valves, safety valves, check valves, and other similar devices developed for other purposes but which air brake engineers of the Air Brake Division believe can be assembled to serve as a practical and suitable power brake equipment for track motor cars and hand cars operated separately or in coupled relation to other track motor cars and hand cars; and that the schedules of components in said quotation do not include other component items required for installation of the equipment, such as piping, mounting brackets, and other fastening devices which are customarily provided by the customer or by independent contractors installing the air brake equipment.

10. That additional costs will be incurred by the customer, as to which deponent can give no estimate, in connection with engineering and other services to determine a suitable manner of mounting the air brake components on the vehicles, adequacy of brake shoes and brake rigging presently employed in hand operated brake equipment of track motor cars for use in a power brake system, provision of suitable brake shoes and brake rigging in the case of hand cars not previously equipped with brake equipment, as well as labor and material costs involved in the actual installation of the air brake equipment components, piping, brake shoes and brake rigging in associative relation into an integrated operating brake system on the vehicles; and that therefore the prices stated on the quotation represent only the cost of that portion of the equipment and installation which the Air Brake Division of said Company would furnish under its quotation.

11. That in view of the fact that deponent and the engineering personnel of the Air Brake Division of Westinghouse Air Brake Company have had no prior experience in furnishing air brake equipment for installation on track motor cars and hand cars and in view of the fact that they are therefore without experience and knowledge of special requirements as may later be determined to be desirable for air brake equipment of such vehicles, such as necessary rates of retardation for obtaining required stopping distances, compensation for variations in load by means of multiple capacity brake equipment, and other factors involved in operation of these vehicles under any and all service conditions, deponent and the engineering personnel of the Air Brake Division of said Company are without a suitable guide or standard on the basis of which the air brake equipment components identified in the aforesaid quotation can with certainty be recommended or guaranteed as the best possible brake equipment that could be designed for all types of motor cars and all kinds of operating conditions; and since deponent and the engineering personnel of the Air Brake Division of said Company have no present detailed specifications as to what would be considered satisfactory braking performance under any and all conditions which such vehicles will encounter in service, it must be recognized that unless and until actual installations of air brake equipment are made on track motor cars and hand cars and tried and tested under actual service conditions, it is possible that special new designs of air brake components may be dictated by the special service conditions or mounting requirements of the various types of vehicles, together with further engineering study of the problems and factors special to application of air brake equipment to such vehicles; and that it is not presently possible for deponent to state unqualifiedly that the air brake equipment set forth in the aforesaid quotation will serve to provide adequate braking under all conditions which the said vehicles may encounter in service operation.

12. That, if as a result of installation and performance data obtained on air brake equipment of the type set forth in the aforesaid quotation, on various types of motor cars, it appears that in order to satisfactorily meet the service requirements incident to use of track motor cars and hand cars under different conditions, an entirely new and more comprehensive air brake equipment should be designed and developed, then a program of design and development of such new equipment and time required to manufacture such equipment could conceivably require as much as a year; and because of the uncertainty with respect to all factors involved in such a program of development, no present reasonable estimate of what such a program of development would cost is feasible at the present time.

SAMUEL L. POORMAN

Sworn to and subscribed before me this 5th day of June, 1957.

TRUMAN C. WAMPLER
Notary Public.

(SEAL)

TRUMAN C. WAMPLER, Notary Public
Wilmerding, Allegheny County
My Commission Expires
January 31, 1961

Exhibit A

WESTINGHOUSE AIR BRAKE COMPANY
WILMERDING, PENNSYLVANIA
AIR BRAKE DIVISION

QUOTATION SHEET

(Please refer specifically to this quotation when placing order)

May 31, 1957

Mr. H. A. Lockhart
General Purchasing Agent
Baltimore & Ohio Railroad
Baltimore 1, Maryland

Dear Sir:

Mr. John E. Nolan Jr. of the legal firm Steptoe and Johnson, representing the Baltimore and Ohio Railroad, requested by telephone, a quotation on equipment suitable for maintenance of way motor and trailer cars. Although it is not general practice to apply power brakes to such vehicles, the attached Specifications 1, 1A, 2, and 2A, all dated May 29, 1957, represent the equipment which we would tentatively offer for such application.

Specifications 1 and 1A cover a straight-air type equipment. With this method, air is supplied to the brake cylinders of the motor and trailer directly from the brake valve on the motor car. In straight-air operation, the hose between the motor and all trailers must remain connected and open to provide brakes.

Specifications 2 and 2A cover an automatic type equipment. With this method, air pressure is stored in a reservoir on each unit and brake cylinder air pressure is applied from this reservoir by reducing pressure in the train line at the break valve on the motor unit. The air in the reservoirs is also supplied from the brake valve. The automatic brake will apply the brakes on all units during an

unintentional separation providing the brake system has been charged.

We are pleased to quote the following prices:

Specification # 1, dated May 29, 1957, covering a straight-air brake equipment suitable for one (1) maintenance of way motor car is priced at $464.37

Specification # 1A, dated May 29, 1957, covering a straight-air brake equipment suitable for one (1) maintenance of way trailer car is priced at ..... $ 90.59

Specification # 2, dated May 29, 1957, covering an automatic air brake equipment suitable for one (1) maintenance of way motor car is priced at $621.46

Specification # 2A, dated May 29, 1957, covering an automatic air brake equipment suitable for one (1) maintenance of way trailer car is priced at $193.07

The above prices are f.o.b. Wilmerding, Pa. and are subject to adjustment to conform to the prices in effect at the time of shipment.

While these Specifications represent what we would consider a suitable brake system, the Specifications may require changes to meet present unknown conditions. In this event, the prices of the equipments would change accordingly.

Yours very truly,

K. CHRISSINGER
K. Chrissinger
Assistant Eastern Manager

KC:HML:ry

TENTATIVE SPECIFICATION NO. 1

Covering

STRAIGHT AIR BRAKE EQUIPMENT SUITABLE FOR ONE MAINTENANCE OF WAY MOTOR CAR

for

B & O RAILROAD

SPECIFICATION ISSUED: MAY 29, 1957

Item	Quan.	Description	Pc. No.	Outline Dwg. No.	Net Wt. Ea. Lbs.
		BRAKE DETAILS			
1	1	SA-5 brake valve, complete with locking pin and chain	554356	E-61783	6¼
2	1	2½" S.P. air gage (MR)	516314	E-64859-1	1
3	2	6" x 2½" brake cylinders	534039		
4	2	9/32 x 22" hose	205889		¾
		COMPRESSOR DETAILS			
5	1	Belt driven air compressor	226720		
a	1	8" pulley	211444		
		MAIN RESERVOIR DETAILS			
6	1	8" x 41" enamelled main reservoir	549902	E-69803-102	46
a	1	½" drain cock	99080		1½
7	1	E-1 safety valve	24107-0100		
		PIPING DETAILS			
8	2	½" cutout cocks	99085		1½
9	2	⅝" x 19" hose w/½" threaded nipple & HS-2 coupling	541606	C-A78956-20	

NOTES:

1. Compressor, item 5, will provide 7¼ ft. of free air per minute @ 1250 rpm. Maximum compressor speed, must not exceed 3000 rpm. Engine driven pulley and belts are not included in this specification.
2. An alternate gasoline driven compressor unit complete with engine can be supplied on request.
3. Warning details are not covered in this specification but can be provided if required.
4. Pipe, pipe fittings, mounting brackets, and brake rigging not included in this specification. Braking ratio should be based on 45 psi maximum brake cylinder pressure, and 70% of the light weight of the car.

WESTINGHOUSE AIR BRAKE COMPANY
AIR BRAKE DIVISION
WILMERDING, PA., U.S.A.

ARM:sjl

TENTATIVE SPECIFICATION NO. 1A

Covering

STRAIGHT AIR BRAKE EQUIPMENT SUITABLE FOR ONE MAINTENANCE OF WAY TRAILER CAR

for

B & O RAILROAD

SPECIFICATION ISSUED: MAY 29, 1957

Item	Quan.	Description	Pe. No.	Outline Dwg. No.	Net Wt. Ea. Lbs.
1	2	6" [illegible]" brake cylinder	534039		
2	2	9/32" x 22" hose	205889		¾
3	2	½" cutout cock	99685		1½
4	2	⅝" x 19" hose w/½" threaded nipple and HS-2 coupling	541606	C-A78956-20	
5	1	½" cutout cock w/side vent	501084		1½

NOTES:

1. Pipe, pipe fittings, mounting brackets, and brake rigging are not included in this specification. Braking ratio should be based on 45 psi maximum brake cylinder pressure, and 70% of the light weight of the car.
2. Cutout cock, item 5, is used for changing from empty to loaded weight of car. Brake cylinder piping should be arranged to brake empty car with one brake cylinder with cock, item 5, closed. Loaded car should be braked with two brake cylinders with cock, item 5, open.

WESTINGHOUSE AIR BRAKE COMPANY
AIR BRAKE DIVISION
WILMERDING, PA., U.S.A.

ARM:sjl

TENTATIVE SPECIFICATION NO. 2

Covering

AUTOMATIC AIR BRAKE EQUIPMENT SUITABLE FOR ONE MAINTENANCE OF WAYS MOTOR CAR

for

B & O RAILROAD

SPECIFICATION ISSUED: MAY 29, 1957

Item	Quan.	Description	Pc. No.	Outline Dwg. No.	Net Wt. Ea. Lbs.
		BRAKE DETAILS			
1	1	SX-2 brake valve	16119	D-13885	17½
a	1	brake valve handle	72306		
2	1	N-1 reducing valve	552238-0070	C-A72918-62	4¾
3	1	3½" duplex air gage (MR & BP)	44316	D-78518-11	
4	1	D-1 triple valve	EC-8840		
5	1	7⅛" x 14" enamelled auxiliary reservoir (455 cu. in.)	501142	B-A69807-6	
a	1	Reservoir release valve	88912		
b	1	¼" pipe plug	1635	LS-40-10	
6	2	6" x 2½" brake cylinder	534039		
7	2	9/32" x 22" hose	205889		
		MAIN RESERVOIR DETAILS			
8	1	8" x 41" main reservoir	549902	E-69803-102	
a	1	½" drain cock	99080		
9	1	E-1 safety valve	24107-0100		
		COMPRESSOR DETAILS			
10	1	Belt driven air compressor	226720		
a	1	8" pulley	211444		
		PIPING DETAILS			
11	2	½" cutout cock	99085		
12	2	⅝" x 19" hose with ½" threaded nipple and HS-2 coupling	541606	C-A78956-20	

NOTES:

1. Compressor, item 5, will provide 7¼ ft. of free air per minute @ 1250 rpm. Maximum compressor speed, must not exceed 3000 rpm. Engine driven pulley and belts are not included in this specification.
2. An alternate gasoline driven compressor unit complete with engine can be supplied on request.
3. Warning details are not covered in this specification but can be provided if required.
4. Pipe, pipe fittings, mounting brackets, and brake rigging not included in this specification. Braking ratio should be based on 45 psi maximum brake cylinder pressure, and 70% of the light weight of the car.

WESTINGHOUSE AIR BRAKE COMPANY
AIR BRAKE DIVISION
WILMERDING, PA., U.S.A.

ARM:sjl
5/29/57

TENTATIVE SPECIFICATION NO. 2A

Covering

AUTOMATIC AIR BRAKE EQUIPMENT SUITABLE FOR ONE MAINTENANCE OF WAYS TRAILER CAR

for

B & O RAILROAD

SPECIFICATION ISSUED: MAY 29, 1957

Item	Quan.	Description	Pc. No.	Outline Dwg. No.	Net Wt. Ea. Lbs.
1	1	D-1 triple valve	EC-8840		
2	1	7⅛" x 14" enamelled auxiliary reservoir (455 cu. in.)			
a	1	Reservoir release valve	88912		
b	1	¼" pipe plug	1635	LS-40-10	
3	2	6" x 2½" brake cylinder	534039		
4	2	9/32" x 22" hose	205889		
5	2	½" cutout cock	99085		
6	2	⅝" x 22" hose w/½" threaded nipple and HS-2 coupling	540568		
7	1	½" cutout cock w/side vent	501084		1½

NOTES:

1. Pipe, pipe fittings, mounting brackets, and brake rigging are not included in this specification. Braking ratio should be based on 45 psi maximum brake cylinder pressure, and 70% of the light weight of the car.

2. Cutout cock, item 7, is used for changing from empty to loaded weight of car. Brake cylinder piping should be arranged to brake empty car with one brake cylinder with cock, item 7, closed. Loaded car should be braked with two brake cylinders with cock, item 7, open.

WESTINGHOUSE AIR BRAKE COMPANY
AIR BRAKE DIVISION
WILMERDING, PA., U.S.A.

ARM:ajl

5/29/57

Affidavit

The New York Air Brake Company
230 Park Avenue
New York 17, N. Y.

to

Messrs. Steptoe and Johnson
1100 Shoreham Building
Washington 5, D. C.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

The undersigned R. Lee Mitchell being duly sworn says that he is General Manager-Railroad Sales of The New York Air Brake Company, that he makes the following statement in that capacity, and that the following statement is true and correct to the best of his knowledge and belief:

You have requested us, as one of the principal suppliers of railroad air brake equipment, to furnish information concerning the type of equipment required to be installed upon a motor track car towing a push truck or trailer car in accordance with the decision of the Supreme Court of the United States in The Baltimore and Ohio Railway Company, petitioner, v. Daniel T. Jackson.

In furnishing this information we are assuming that the decision requires that the equipment would have to consist of an air brake system embracing both cars with braking apparatus on the trailer car controlled from the motor track car. Inasmuch as the decision appears to us to be silent on the question of whether the system need contain automatic protection against a break-in-two of the coupled cars. i.e., a device which would apply brakes automatically to both the motor track car and trailer car in the event that they separate, we are furnishing the information concerning both a system containing this protection as well as a straight air brake system.

In furnishing this information, it must be understood that, while we have exerted reasonable efforts to compile

estimates in the short time available to us, we must reserve the right to alter these estimates in the event that equipment of the kind described should be ordered from us. In addition, our estimates are concerned solely with the operating air brake equipment and exclude foundation brake rigging and brake shoes which would be required to complete the braking system.

While no system suitable for the application in question is presently sold for railroad use, we believe the least expensive solution would be to assemble a system from existing small lightweight components presently being incorporated in braking systems for such non-railroad use as streetcars and automotive vehicles. Inasmuch as the proposed application is a novel one, the effectiveness of any system so assembled is, of course, a matter that could not be determined without careful testing under actual conditions of use.

We estimate that were a straight air brake system to be assembled in this manner the weight of the equipment on the motor track car would be approximately 100 pounds and the weight of the equipment on the trailer car would be approximately 25 pounds. Should automatic protection against a break-in-two be required the weights would increase to approximately 150 pounds and 75 pounds, respectively.

You have informed us that a supplier to the Baltimore and Ohio Railway Company has estimated the selling price of the equipment as follows:

Straight air brake system	
motor track car	$464.37
trailer car	90.59
Automatic air brake system	
motor track car	$621.46
trailer car	193.07.

We believe our sales prices for the equipment would approximate these figures.

R. LEE MITCHELL
R. Lee Mitchell,
General Manager-Railroad Sales

THE NEW YORK AIR BRAKE COMPANY

Sworn to before me, this
Fifth day of June, 1957

MARGARET L. KELLER
Notary Public

Margaret L. Keller
Notary Public for the State of New York
No. 31-7208950
Qualified in New York County
Term Expires March 30, 1958

APPENDIX B

STATE OF OHIO
COUNTY OF CUYAHOGA } ss:

I, William J. Metzger, being of legal age, depose and say as follows:

That for forty-six years I have been an employee of National Malleable and Steel Castings Company, a large United States manufacturer of automatic couplers for use on railroad vehicles. For the past twenty years I have been Chief Coupler Design Engineer for that company. I am familiar with the type of motor track cars and push trucks involved in the recent decision of the Supreme Court of the United States in the case of the Baltimore and Ohio Railroad Company vs. Jackson. My employer manufactures couplers smaller than standard sizes, about the smallest of which is known as a reduced size Willison coupler which is used to a great extent on mine cars in the United States and in foreign countries. This reduced size Willison coupler sells for an average price of about $40.00 each and weighs 56 pounds. It is normally mounted in a pocket casting applied to the car, each of which weighs approximately 45 pounds and sells for about $20.00 each. The application of two couplers and two pocket castings to a car would add about 200 pounds to the weight of the car without the use of any cushioning device to absorb shocks between the cars. The addition of a cushioning device applied to each end of the car would add more weight, depending upon the type of device used.

I estimate that to develop a coupler lighter than the aforesaid Willison coupler for use on said cars would

take about nine months and the development expenses involved would be approximately from $25,000 to $30,000.

WILLIAM J. METZGER
William J. Metzger

June 4, 1957

Sworn to before me this 4th day of June, 1957.

HARRY E. RICE
Notary Public

Harry E. Rice, *Notary Public*
My Commission Expires Jan. 23, 1959

MOTION FILED JUN 7 1957
LIBRARY SUPREME COURT, U.S.

No. 370

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED BY THIS COURT ON THE MERITS ON MAY 13, 1957

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF SAID PETITION FOR REHEARING, TO BE CONSIDERED IN CASE SAID MOTION FOR LEAVE TO FILE BE GRANTED.

GREGORY S. PRINCE
PHILIP F. WELSH
EDWARD G. HOWARD
929 Transportation Building
Washington 6, D. C.
Counsel for The Association of American Railroads,
Amicus Curiae.

SUBJECT INDEX

	Page
Motion for leave to file brief *amicus curiae* in support of petitioner's petition for rehearing	iii
Brief of The Association of American Railroads as *amicus curiae* in support of petitioner's petition for rehearing	1
I. INTEREST OF *AMICUS CURIAE*	1
II. ARGUMENT	2
Point 1. The decision defeats the purpose of the Safety Appliance Acts by increasing the hazards of railroad operations and therefore constitutes a departure from principles that formerly guided this Court	2
Point 2. The Court was not advised of the existence of the Act of July 18, 1866 and therefore misconstrued the language of § 8	4
Point 3. The decision is in effect a legislative act producing drastic consequences and it should therefore be vacated	6
III. CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CASES, STATUTES, COURT RULES AND OTHER AUTHORITIES CITED

Cases

	Page
American R.R. v. *Didricksen*, 227 U.S. 145 (1913)	7, 8
Camunas v. *Porto Rico Ry., Light & Power Co.*, 272 Fed. 924, 930 (1st Cir. 1921)	8
Illinois Central R.R. v. *Williams*, 242 U.S. 462 (1917)	8
In the Matter of Safety Appliances on Equipment of Railroads in Porto Rico, 37 I.C.C. 470 (1915)	7
Pennell v. Philadelphia & R. Ry., 231 U.S. 675 (1914)	3
United States v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951)	2

Federal Statutes

Act of March 2, 1917, 48 U.S.C. § 751	8
Act of July 18, 1866, 14 Stat. 178	4, 5
Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270	6,
Federal Safety Appliance Acts, 45 U.S.C. §§ 1-16	*passim*
R.S. § 4	4
Safety Appliance Act of 1893, § 7, 27 Stat. 532	7

Rules of This Court

Rule 42	iii, 1

Miscellaneous

ICC Statistics of Railways in the United States, 1955	8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED BY THIS COURT ON THE MERITS ON MAY 13, 1957

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING

The Association of American Railroads (hereinafter referred to as "the AAR"), on behalf of its entire membership, hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of petitioner's petition for rehearing. The consent of counsel for the petitioner has been obtained. The consent of counsel for the respondent has been requested but refused. Hence this petition is filed under Rule 42 (2) and (3).

The AAR is a voluntary, unincorporated, non-profit

organization composed of member railroad companies operating in the United States, Canada and Mexico. Full membership is open to all Class I railroads (and to certain other railroads) and there is provision for associate membership.

There are at present 186 full members and 164 associate members of the AAR. The Class I member railroads operate over 99 percent of the total railroad mileage of Class I railroads in the United States and have gross operating revenues of over 99 percent of the total Class I operating revenues in this country. The activities of the AAR cover a wide range having to do with such matters as research, operations, car service, traffic, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

The AAR, as the joint representative and agent of these railroads in connection with all Federal legislation, has a definite interest in all significant developments that enlarge the scope or extent of the Federal Safety Appliance Acts, 45 U.S.C. § § 1-16. This interest is based upon a concern for the welfare of the railroad industry as a whole, and is not confined to the specific facts of any particular litigation.

It is understood that the petitioner, The Baltimore and Ohio Railroad Company, will make timely filing of a petition for rehearing in which it will pray this Court to reconsider and modify its opinion and judgment herein of May 13, 1957. The AAR, if this motion for leave to file a brief *amicus curiae* in support of said petition for rehearing be granted, does not intend to ask this Court to give further appraisal to the facts

in evidence herein, or to particularities of contentions and arguments heretofore made by the petitioner and the Interstate Commerce Commission when the case was originally argued on the merits. We wish instead to present certain additional considerations which will demonstrate the radical consequences of the decision for the railroad industry and the great desirability from the viewpoint of the railroads and all who work for them that it be reconsidered and vacated and that the decision of the Court of Appeals be reversed. We desire to emphasize to the Court that the decision will have the force, effect, and character of new and unexpected legislation, being in substance a new statute. We are obliged to say that it is legislation that finds the industry wholly unprepared and that will create enormous problems of compliance to which no one concerned with the Safety Appliance Acts—the railroads, the Interstate Commerce Commission, the labor organizations representing maintenance-of-way employees, and the manufacturers of safety appliances—has previously given thought. We shall stress that the end objective of the Safety Appliance Acts, namely, railroad safety, will be impaired.

It is unreasonable to assume that Congress would have intended such drastic consequences as will result from the Court's decision. From a revolutionary result it is necessary to reason backwards to an absence of Congressional purpose in the beginning.

Mindful of the many demands on the Court's time, we hope to submit in the smallest possible compass certain additional reasons, new to this case in substance or emphasis, why the judgment below should have been reversed.

Wherefore, your movant respectfully prays that

this motion be granted and presents and files its separate brief *amicus curiae,* bound together with this motion, upon which it will rely if the present motion be granted.

Respectfully submitted,

GREGORY S. PRINCE
PHILIP F. WELSH
EDWARD G. HOWARD
Counsel for the Movant,
The Association
of American Railroads

June 7, 1957

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 370

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

v.

DANIEL T. JACKSON,
Respondent

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING.

I

INTEREST OF *AMICUS CURIAE*

A concise statement of the interest of The Association of American Railroads is set out in the preceding motion for leave to file this brief, as required by Rule 42 (3). Instead of repeating that statement here, we refer to that statement and ask that it be considered as incorporated here by reference and as proper compliance with Rule 42 (5) requiring that a brief *amicus curiae* "set forth the interest of the *amicus curiae*, * * *."

II

ARGUMENT

POINT 1

THE DECISION DEFEATS THE PURPOSE OF THE SAFETY APPLIANCE ACTS BY INCREASING THE HAZARDS OF RAILROAD OPERATIONS AND THEREFORE CONSTITUTES A DEPARTURE FROM A MAJOR PRINCIPLE THAT FORMERLY GUIDED THIS COURT.

The members of this Court are not divided as to the broad purpose of the Safety Appliance Acts. Both the opinion of the Court and that of the dissenting Justices explicitly recognize that these Acts are designed primarily to protect employees and others from the hazards that arise from dangerous or defective railroad equipment. This is not a case, then, where the basic purpose or "intent" of Congress is obscure or can be found only in tenuous inferences from reports or debates. The purpose here is plain and it is undisputed.

Does the Court's decision advance this purpose or tend to defeat it? We think the latter and we therefore think the decision departs from a major principle by which this Court has always been guided. It has always considered itself bound to interpret statutes in accordance with a clear legislative purpose so as to effectuate that purpose. "The statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent." *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951).

This approach—that of interpreting statutory language in the manner that best comports with the purpose of the act and best prevents the evil sought to be

prevented—has been relied on by this Court in interpreting the very Acts under which this case arose. In *Pennell* v. *Philadelphia & R. Ry.*, 231 U.S. 675 (1914), for example, this Court held that a locomotive tender need not have automatic couplers at both ends (despite the literal language of the 1903 Amendment to the Safety Appliance Acts requiring all "tenders" to have "couplers") because "the purpose of the statute," that of "safety in making and unmaking the connections," could not have been aided by requiring automatic couplers to be placed between locomotives and tenders.

In the present case, this Court has done just the opposite of what it did in the *Pennell* case: it has to an extent nullified the purpose of Congress, not furthered it, by forcing railroads—in the name of "safety"—to make their maintenance-of-way vehicles *more* dangerous than they were before.

The chief ways in which railroad safety has thus been impaired are clear. They can be summarized as follows:

1. The increased weight of track cars that will result from addition of such "safety devices" as train or power brakes, automatic couplers, standard drawbars and the like will make it difficult or perhaps impossible for such vehicles to be lifted from the track by the crews aboard them, which normally consist of three or four men (R. 78). The decision thus *increases* the prime danger that track cars will be hit by trains that must pass over the same track (*cf.* R. 42).

2. A train brake system extending from a motor track car to one or more push cars behind it necessitates connecting appurtenances such as air hoses. This will make the vehicles as a group considerably more diffi-

cult to remove from the tracks quickly, regardless of increased weight, since the brake appurtenances must first be disengaged.

3. Installation of power or train brakes on maintenance-of-way vehicles would conduce to sudden stops. The crews of these vehicles would therefore be subjected to far greater risks than exist at present of being thrown from the vehicles and thus of sustaining the very type of injury that forms the basis of this case (R. 65).

Nothing to be found in the record or in the Court's opinion permits an inference that the decision can have the effect of fostering railroad safety.* The affirmance tends to defeat the acknowledged purpose of Congress. It should therefore be vacated.

POINT 2.

THE COURT WAS NOT ADVISED OF THE EXISTENCE OF THE ACT OF JULY 18, 1866 AND THEREFORE MISCONSTRUED THE LANGUAGE OF § 8.

The opinion of the Court lays great stress on the language of 45 U.S.C. § 8 that in terms extends the Safety Appliance Acts to "all trains, locomotives, tenders, cars, and similar vehicles." The Court characterized these words as language that "could not have been more all inclusive." In consequence it held track motor-cars to be included thereunder.

The fact is, however, that the language *could* have been considerably more all inclusive conformable to a statute some 37 years old in 1903, but not hitherto brought to the Court's notice in this case. The Act of

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* Any improvement in stopping time that might result from train brakes would be at least offset, if not overbalanced, by the increased risks attendant on sudden stops.

July 18, 1866 (14 Stat. 178; R.S. § 4) provided that when used in an act of Congress

> "The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land."

If, therefore, Congress had wished to include maintenance-of-way cars among the conveyances subject to the Acts, it would have used simply the "all inclusive" word "vehicles" to which it had long before given the broadest possible definition for the very purpose of use in statutes. The use of the phrase "all track vehicles" in § 8 would have comprehended track cars, hand cars, push cars and every other conceivable conveyance that might be operated over the tracks of a railroad.

But Congress did not use this ready-made language. Instead it adopted language that by contrast is quite unsuited to the alleged purpose of including track cars within the scope of the Safety Appliance Acts. For that supposed purpose, indeed, the language of § 8 is intolerably cumbersome; for the critical language of that Section consists in the enumeration of four distinct types of conveyances plus "*similar*" vehicles. Track cars are *dis*similar to them all in almost every way.

This Court has assumed that the quoted language of § 8 could not have been broader and therefore gave it the construction that Congress had explicitly given only to "vehicles." The effect is to attribute to Congress ignorance of its own action in 1866 and thereby to make mere surplusage of its meaningful words "trains, locomotives, tenders, cars" and "similar." It is manifest, however, in view of the statutory defini-

tion of "vehicle," that those words could not have been surplusage.

In this particular—which is basic to the result of the *Jackson* case—the Court's decision was rendered without the benefit of advice as to the existence of a relevant statute. For this reason alone the decision should be reconsidered.

Point 3

THE DECISION IS IN EFFECT A LEGISLATIVE ACT PRODUCING DRASTIC CONSEQUENCES AND IT SHOULD THEREFORE BE VACATED.

The decision of this Court holds that the Safety Appliance Acts have extended to maintenance-of-way vehicles since 1903. Such is its literal technical meaning.

Viewed in its practical aspects, however, the decision has every effect that new legislation by Congress would have. There is no previous decision squarely in accord with the present decision, with the exception of a single state case involving a different safety appliance. The essentially legislative nature of the decision is even more apparent when it is remembered that the Interstate Commerce Commission, charged with the duty of enforcing these Acts, has never taken any steps to discharge that duty by applying the Acts to track maintenance vehicles of the kind here involved. These points have already been made in the briefs filed by the petitioner and by the Commission as *amicus*, and we do no more than mention them here in order to demonstrate the precipitous change in the law attendant upon this decision.

The Association of American Railroads is responsible for the legislative interests of its members. It has for years been registered under the Federal Regulation of Lobbying Act (2 U.S.C. §§ 261-270). For that reason it has a direct interest in and concern with all

legislation that may affect railroads. It is familiar with the process by which Congressional acts are passed.

It is gravely concerned with the effect the present decision will have on the industry. It respectfully submits that the Court's action is based on evidence that is insubstantial as compared to the factual material customarily presented by interested parties to Congressional committees when legislation is before them. Moreover, it is certain that had Congress passed a statute to that effect, it would have allowed a reasonable time for the railroads to conform to its provisions. Compare the authority for extending time for compliance embodied in § 7 of the first Safety Appliance Act, 27 Stat. 532 (1893).

The history of the Acts affords a close parallel to the present case. It demonstrates the unsoundness and ultimate ineffectiveness of legislative decisions such as this.

In *American R. R.* v. *Didricksen,* 227 U.S. 145, decided in January 1913, this Court held that the Safety Appliance Acts extended to Puerto Rico. Neither the Interstate Commerce Commission nor the affected railroads had theretofore considered the Acts to be so applicable. See *In the Matter of Safety Appliances on Equipment of Railroads in Porto Rico,* 37 I.C.C. 470, 471 (1915).

In April 1913, less than three months after the *Didricksen* decision had been handed down, the Commission suspended this application of the Acts and began an investigation of the matter which culminated some two and one-half years later in the Commission decision last above cited. The investigation disclosed that the Safety Appliance Acts should not, as a practical matter, have applied to cane cars, the largest single category of freight cars owned by the Puerto Rican

railroads. See 37 I.C.C. at 475. The Acts never became effective in Puerto Rico because the Commission's suspension order remained in force until the *Didricksen* case was in effect reversed by the Act of March 2, 1917, 48 U.S.C. § 751. See *Camunas* v. *Porto Rico Ry., Light & Power Co.*, 272 Fed. 924, 930 (1st Cir. 1921).

This Court's decision in the *Didricksen* case, futile though it was, depended in large part on the correct construction of statutes that were basic to the establishment of American government in Puerto Rico. The present decision, depending solely on an erroneous construction of the Safety Appliance Acts, derives no such collateral support from the construction of other statutes.

There are two other major differences between the *Didricksen* situation and that of the present case:

First, it is uncertain whether the Commission has authority to suspend the effect of this decision as it did with respect to Puerto Rico. *Cf. Illinois Central R.R.* v. *Williams*, 242 U.S. 462 (1917).

Second, the *Didricksen* case affected only nine narrow-gauge railroads operating but 335 miles of track with 77 locomotives and 2,813 cars. See 37 I.C.C. at 474-475. The present decision affects more than 100 major American railroads operating more than 350,000 miles of track (see ICC Statistics of Railways in the United States, 1955) and using about 60,000 motor track cars (R. 78) as well as an undetermined number of other maintenance-of-way vehicles.

If motor track vehicles must have train or power brakes, automatic couplers and perhaps standard drawbars when hauling other track vehicles, then the railroads must either 1) install them, at great expense, to the detriment of their employees, 2) urge passage of an appropriate amendment to the Acts, 3) ma-

terially change methods of track maintenance; or 4) give up maintenance of way.

The fourth course would be unthinkable, for the railroads cannot operate unless their tracks and roadbeds are constantly kept up. But none of the other three courses could be put into effect without considerable lapse of time. No matter which of these three choices the railroads adopted, therefore, they would be forced to violate the Acts for months or perhaps years, thus unavoidably subjecting themselves to fines under 45 U.S.C. § 6 or § 13. It is plain, therefore, that the decision forces the railroads into a dilemma from which there can be no satisfactory extrication.

In adopting the Safety Appliance Acts, Congress could not have intended to force the railroads first to violate the Acts and thereafter to spend large sums of money in order to imperil their employees. That is what the decision requires. It is plainly wrong. The Court should not permit it to stand.

III

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the Court in this case should be reheard and vacated and that the judgment of the Court of Appeals for the District of Columbia Circuit should thereupon be reversed.

Respectfully submitted,

GREGORY S. PRINCE
PHILIP F. WELSH
EDWARD G. HOWARD
Counsel for The Association of American Railroads,
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and accompanying Brief have this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first class mail, postage prepaid. Copies thereof have also been so mailed to the Solicitor General, Department of Justice, Washington 25, D.C., and the General Counsel of the Interstate Commerce Commission, Washington 25, D. C.

June 7, 1957

EDWARD G. HOWARD
Counsel for The Association of American Railroads,
Amicus Curiae